Supreme Court of the United States

OCTOBER TERM, 1968

No. 47

WALTER B. FOSTER,

Petitioner,

—v.—

CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIFTH APPELLATE DISTRICT

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14) July 31, 1967—Supreme Court, State of California orders time for granting or denying a hearing on petition for hearing in Supreme Court on denial of Motion to Recall Remittitur, Vacate Judgment and Reinstate Appeal, filed District Court of Appeal, Fifth Appellate District, California, extended to and including September 26, 1967.

15) September 22, 1967—Hearing denied on petition for hearing to Supreme Court on denial of Motion to Recall Remittitur, Vacate Judgment and Reinstate Appeal, filed District Court of Appeal, Fifth Appellate District, California.

16) September 8, 1967—Petition for Writ of Certiorari, United States Supreme Court.

17) September 8, 1967—Motion to proceed in Forma Pauperis—Filed United States Supreme Court.

18) January 16, 1968—Motion for the appointment of Counsel—Filed United States Supreme Court.

19) March 25, 1968—Order on Motion to Proceed in Forma Pauperis and on Writ of Certiorari granted, limited to the question of whether the conduct of the police lineup resulted in a violation of the petitioner's constitutional rights.

20) May 6, 1968—Order for Appointment of counsel granted; KENNETH L. MADDY, Fresno, California appointed.

IN THE DISTRICT COURT OF APPEAL
FIFTH APPELLATE DISTRICT
STATE OF CALIFORNIA

Fresno County No. 21561

No. 5 CR 283

Appeal from the Superior Court of Fresno County,
Honorable Harold V. Thompson, Judge.

Filed, June 15, 1966, J. L. Brown, Clerk,
By Patricia R. Starks, Deputy.

Filed, Dist. Court of Appeal-Fifth Dist., July 22, 1966,
James G. Huggins, Clerk,
Elizabeth B. Pliske, Deputy Clerk.

THE PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFF and RESPONDENT

vs.

WALTER FOSTER, DEFENDANT and APPELLANT

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DOCKET ENTRIES

1) March 17, 1966—Information filed by District Attorney, Fresno County, California against WALTER FOSTER for violation of Section 211(a) of the California Penal Code, Armed Robbery.

2) March 21, 1966—WALTER FOSTER arraigned, Fresno County, California, Superior Court.

3) May 9, 1966-May 10, 1966—Trial held in Superior Court, Fresno County, California.

4) May 26, 1966—Abstract of Judgment filed.

5) May 20, 1966—Notice of Appeal filed.

6) July 22, 1966—Record filed in District Court of Appeal, Fifth Appellate District, State of California.

7) April 25, 1967—Judgment Affirmed by District Court of Appeal, Fifth Appellate District, State of California.

8) June 2, 1967—Petition for hearing in the Supreme Court of the State of California.

9) June 21, 1967—Hearing denied by Supreme Court of the State of California.

10) June 26, 1967—Remittitur to Fresno County California Clerk by District Court of Appeal, Fifth Appellate District, California.

11) June 27, 1967—Motion to Recall the Remittitur, Vacate Judgment and Reinstate Appeal, filed District Court of Appeal, Fifth Appellate District, California.

12) June 28, 1967—Motion to Recall Remittitur, Vacate Judgment and Reinstate Appeal, filed District Court of Appeal, Fifth Appellate District, California, denied.

13) July 28, 1967—Petition filed for hearing in Supreme Court on denial of Motion to Recall Remittitur, Vacate Judgment and Reinstate Appeal, filed District Court of Appeal, Fifth Appellate District, California.

Clerk's Transcript on Appeal

Apearances:

E. Clarke Savory, District Attorney in and for Fresno County, Courthouse, Fresno, California.

By: James L. Quaschnick and Frank E. Wells, Deputy District Attorneys,

Attorneys for Plaintiff and Respondent.

Walter Foster, California Medical Facility, Vacaville, California,

Defendant in Propria Personna.

FILED
MAR 1 1961
J. L. BROWN, CLERK
By [illegible]
DEPUTY

No. 21561 Dept. 1

The People of the State of California

AGAINST

WALTER FOSTER AND JOHN HENRY GRICH

In the Superior Court of the State of California
In and for the County of Fresno

The District Attorney of the County of Fresno hereby accuses WALTER FOSTER and JOHN HENRY GRICH of a felony, to-wit: VIOLATION OF SECTION 211(a) OF THE PENAL CODE, ARMED ROBBERY, in that on or about the 25th day of January, 19 61, in the County of Fresno, State of California, they did, while armed with a certain deadly weapon, to wit: a gun, rob one, JOSEPH E. DAVID.

FIRST PRIOR CONVICTION - WALTER FOSTER

And the District Attorney of the County of Fresno further charges that before the commission of the offense charged in this Information and on or about the 5th day of November, 1957, the said WALTER FOSTER was convicted in the Superior Court of the State of California, in and for the County of Fresno, of a FELONY, TO WIT: ASSAULT WITH INTENT TO COMMIT RAPE, and that in pursuance of said conviction the said defendant served a term in the California State Prison at San Quentin, California, a penal institution.

SECOND PRIOR CONVICTION - WALTER FOSTER

And the District Attorney of the County of Fresno further charges that before the commission of the offense charged in this Information and on or about the 26th day of July, 1960, the said WALTER FOSTER was convicted in the Superior Court of the State of California, in and for the County of Tulare, of a FELONY, TO WIT: ROBBERY, and that in pursuance of said conviction the said defendant served a term in the California State Prison at San Quentin, California, a penal institution.

CLARKE SAVORY
District Attorney in and for the County of Fresno
State of California

By [illegible]
Deputy District Attorney

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF FRESNO

DATE March 21, 1966 COURT MET AT _____ DEPARTMENT NO. 1

PRESENT: HON. Matt Goldstein JUDGE E. Scott DEPUTY CLERK

C. Osborne REPORTER Tom Nix BAILIFF

PEOPLE OF THE STATE OF CALIFORNIA VS. Walter Foster

COUNSEL FOR PEOPLE Dwayne Keyes DISTRICT ATTORNEY

COUNSEL FOR DEFENDANT Ken Maddy

[X] ARRAIGNMENT
[ ] PROCEEDINGS - DETERMINATION WHETHER OR NOT DEFENDANT IS

[ ] CERTIFIED UNDER SEC. 859a P.C.

[X] FELONY (IN one COUNTS) TO WIT: Armed Robbery
[ ] MISDEMEANOR

ACTION NO. 21561

PEOPLE REPRESENTED AS ABOVE, AND DEFENDANT PRESENT WITH his COUNSEL.

[X] DEFENDANT STATES TRUE NAME [X] (AS SHOWN)
[X] COURT APPOINTS Maddy TO REPRESENT THE DEFENDANT.
[X] COURT [X] INFORMS DEFENDANT OF H. 2nd LEGAL RIGHTS.
[ ] IS ADVISED BY COUNSEL THAT DEFENDANT HAS BEEN INFORMED OF H. _____ LEGAL RIGHTS.
[X] COPY OF INFORMATION IS PROVIDED TO [X] DEFENDANT [ ] COUNSEL FOR DEFENDANT.
[ ] MOTION UNDER SEC. 995 P.C. IS [ ] GRANTED [ ] DENIED.
[X] DEFENDANT [X] IS ARRAIGNED [X] THROUGH COUNSEL WAIVES THE READING OF THE INFORMATION.
[ ] DEFENDANT MOVES TO SET ASIDE INFORMATION UNDER SEC. 995 P.C.
[ ] DEFENDANT WITHDRAWS PLEA OF _____ GUILTY, AND
[X] DEFENDANT PLEADS [ ] GUILTY AS CHARGED IN COUNT _____ [ ] GUILTY OF THE LESSER INCLUDED OFFENSE OF _____
[X] NOT GUILTY AS TO COUNT one [ ] NOT GUILTY BY REASON OF INSANITY.
[ ] COUNT(S) _____ DISMISSED BY THE PEOPLE IN THE INTEREST OF JUSTICE.
[X] DEFENDANT [X] ADMITS [ ] DENIES [X] PRIOR CONVICTION(S) OF FELONY [ ] BEING ARMED
[ ] THE COURT FIXES THE DEGREE OF THE OFFENSE AS _____ DEGREE.
[ ] PROCEEDINGS ARE SUSPENDED ON GROUND DEFENDANT IS A MINOR, AND DEFENDANT CERTIFIED FOR PROCEEDINGS IN JUVENILE COURT.
[ ] PROCEEDINGS [ ] ARE [ ] HAVE BEEN HERETOFORE ADJOURNED FOR THE PURPOSE OF DETERMINING WHETHER OR NOT DEFENDANT [ ] IS A MENTALLY DISORDERED SEX OFFENDER [ ] IS PRESENTLY SANE
[ ] DR. _____ APPOINTED TO EXAMINE DEFENDANT AND REPORT WHETHER OR NOT DEFENDANT [ ] WAS SANE AT THE TIME OF THE OFFENSE [ ] IS PRESENTLY SANE [ ] IS A MENTALLY DISORDERED SEX OFFENDER, AND THE REPORTS OF THE EXAMINERS TO BE FILED BY _____, 19____
[ ] DEFENDANT WAIVES STATUTORY TIME FOR _____
[ ] REFERRED TO PROBATION OFFICER FOR PRE-SENTENCE INVESTIGATION AND REPORT, RETURNABLE _____, 19____ TO WHICH TIME PRONOUNCEMENT OF JUDGEMENT IS CONTINUED.
[X] CASE IS SET FOR TRIAL ON May 9 1966, _____, 19____ [ ] JURY [X] DEMANDED [ ] WAIVED.
[ ] CONTINUED TO _____, 19____
[X] BAIL IS [X] SET IN THE SUM OF $ 5500 [ ] REDUCED TO $ _____
[ ] DEFENDANT IS REMANDED TO CUSTODY OF THE SHERIFF
[ ] DEFENDANT PERMITTED TO REMAIN AT LIBERTY [ ] ON H. _____ OWN RECOGNIZANCE, [ ] ON BAIL HERETOFORE POSTED.
[X] DEFENDANT IS ORDERED RELEASED FROM CUSTODY.

CRIMINAL MINUTES
ARRAIGNMENT

(1)

This minute order was duly entered in BA and a copy placed in the file.
Attest: C. L. Brown
County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Fresno
By E. Scott DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF FRESNO

DEPARTMENT No. 5

Date: May 9, 1966 Court met at 10:00 a.m.

Present: HON. HAROLD V. THOMPSON, Judge
THOMAS R. NUTT, Reporter
RAY STARKS, Deputy Clerk
DAVID C. SWANSON, Bailiff

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

vs.

WALTER FOSTER and JOHN HENRY GRICE, DEFENDANTS

NATURE OF PROCEEDINGS: TRIAL

ACTION NO. 21561

The District Attorney, by his deputies, James L. Quaschnick and Frank E. Wells, and the defendant, Walter Foster, with his counsel, Kenneth L. Maddy, and the defendant, John Henry Grice, with his counsel, Mikio Uchiyama, comes into open court, this being the time heretofore fixed for the trial of the above-entitled action.

Each party announce they are ready to proceed.

Proceedings are regularly taken to empanel a jury, and the following named persons having been sworn on Voir Dire, selected and accepted, are sworn to try the cause, to-wit:

Mrs. Lois M. Kinnett	Keyes M. Daniels
Mrs. Lois M. Kyle	Mrs. Margaret M. Maull
Winfred P. Pierce	Mrs. Eunice R. Brockway
Mrs. Myriam N. Lemke	Mrs. Doris H. Miles
Hans L. Matheus	Mrs. Betty M. Dossey
Mrs. Kediko Kawasaki	Henry C. Hendrix

The Clerk reads the Information to the jury and states the plea heretofore entered by each defendant.

At the request of counsel, the witnesses, Joseph E. David and Bernice Hampton, are sworn and excluded from the court room until called to testify.

James L. Quaschnick, Deputy District Attorney, makes his opening statement to the jury on behalf of the people.

The defendants, and each of them, reserve an opening statement to the jury at this time.

Joseph E. David, having heretofore been sworn, is called to the stand and testifies in behalf of the people.

People's Exhibit # 1 (Note Written on Western Union Application Form) is received in evidence.

The Court gives the jury the usual admonition, and court adjourns until 1:45 o'clock P.M., this date.

At 1:55 o'clock P.M., court reconvenes. All parties are present in court, and the jury in their seats.

Joseph E. David, having heretofore been sworn, is recalled to the stand for further testimony in behalf of the people.

James B. Clay is sworn and testifies in behalf of the people.

William C. Biggers is sworn and testifies in behalf of the people.

Julia Bernice Hampton, having heretofore been sworn, is called to the stand and testifies in behalf of the people.

Mary Rose Middleton is sworn and testifies in behalf of the people.

Robert T. Jump is sworn and testifies in behalf of the people.

The people rest.

The defendant, Walter Foster, rests.

John Henry Grice is sworn and testifies in his own behalf.

The defendant, John Henry Grice, rests.

The Court gives the jury the usual admonition, and the jury is excused until 9:30 o'clock A.M., May 10, 1966.

In the absence of the jury, the defendant, John Henry Grice, moves for a directed verdict, and said motion is, by the Court, taken under advisement.

Court adjourns until 9:30 o'clock A.M., May 10, 1966.

The defendants, and each of them, are remanded to the custody of the Sheriff of Fresno County.

MINUTES

This minute order was duly entered in R/A and a copy placed in the file

Attest: J. L. BROWN

County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Fresno.

By /s/ Ray Starks
Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF FRESNO

DEPARTMENT NO. 5

Date: May 10, 1966 Court met at 9:30 a.m.

Present: HON. HAROLD V. THOMPSON, Judge
THOMAS R. NUTT, Reporter
RAY STARKS, Deputy Clerk
DAVID C. SWANSON, Bailiff

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

vs.

WALTER FOSTER and JOHN HENRY GRICE, DEFENDANTS

NATURE OF PROCEEDINGS: TRIAL, SECOND DAY

ACTION NO. 21561

Court reconvenes, in the absence of the jury, and the motion of the defendant, John Henry Grice, for a directed verdict is, by the Court, denied.

Court reconvenes in the presence of the jury, pursuant to adjournment of May 9, 1966. All parties are present in court, and the jury in their seats.

Frank E. Wells, Deputy District Attorney, argues the cause to the jury on behalf of the people.

Kenneth L. Maddy argues the cause to the jury on behalf of the defendant, Walter Foster.

Mikio Uchiyama argues the cause to the jury on behalf of the defendant, John Henry Grice.

James L. Quaschnick, Deputy District Attorney, closes the argument to the jury on behalf of the people.

The Court instructs the jury in law governing the case, and the jury retires at 11:49 o'clock A.M., in the charge of a sworn officer to consider of their verdict.

Subsequently the jury returns into court at 2:26 o'clock P.M., in the charge of said officer. At the request of the jury, the Court Reporter reads certain testimony. The jury again retires at 2:40 o'clock P.M., in the charge of said officer to further consider of their verdict.

Subsequently the jury returns into court at 2:50 o'clock P.M., in the charge of said officer. At the request of the jury the Court Reporter reads certain testimony. The jury again retires at 2:58 o'clock P.M., in the charge of said officer to further consider of their verdict.

Subsequently the jury returns into court at 4:07 o'clock P.M., in the charge of said officer. The Court asks the jury if they have agreed upon the verdicts, and the Foreman replies in the negative as to one defendant. The jury again retires at 4:10 o'clock P.M., in the charge of said officer.

Subsequently at 4:32 o'clock P.M., the jury returns into court in the charge of the sworn officer. The Court asks the jury if they have agreed upon the verdicts, and the Foreman replies in the affirmative. The verdicts, being in writing, are secured by the Court, then read to the jury by the Clerk. Polling of the jury is waived as to the defendant, John Henry Grice. At the request of the defendant, Walter Foster, the Clerk polls the jury, and each juror for himself in open court announces the verdict read was his verdict. Thereupon, the Court orders said verdicts recorded, and the Clerk records said verdicts as follows: "In the Superior Court of the State of California, In and for the County of Fresno, The People of

the State of California, Plaintiff, vs. JOHN HENRY GRICE, Defendant. No. 21561. Dept. FIVE. VERDICT. WE, the jury in the above entitled action, find the defendant, JOHN HENRY GRICE, not guilty of VIOLATION OF SECTION 211 (a) OF THE PENAL CODE, ARMED ROBBERY, as charged in the Information filed in Proceedings No. 21561.

Dated: May 10, 1966. KEYS M. DANIEL, Foreman."

"In the Superior Court of the State of California, In and for the County of Fresno, The People of the State of California, Plaintiff, vs. WALTER FOSTER, Defendant. No. 21561. Dept. FIVE. VERDICT.

WE, the jury in the above entitled action, find the defendant, WALTER FOSTER, guilty of VIOLATION OF SECTION 211 (a) OF THE PENAL CODE, ARMED ROBBERY, as charged in the Information filed in Proceedings No. 21561, and we fix the degree thereof as Robbery of the FIRST Degree, and find that the defendant, WALTER FOSTER WAS armed with a deadly weapon.

Dated: May 10, 1966. KEYES M. DANIEL, Foreman."

Thereupon, it is ordered that a release issue for the defendant, JOHN HENRY GRICE.

The matter is, by the Court referred to the Probation Officer for his investigation and report as to the defendant, WALTER FOSTER, and that said report be filed on or before 9:00 o'clock A.M., May 27, 1966, which is the time fixed for hearing said report, and for judgment and sentence.

Thereupon, the jury is excused from further duty in this action.

The defendants, and each of them, are remanded to the custody of the Sheriff of Fresno County.

MINUTES

This minute order was duly entered in R/A and a copy placed in the file

Attest: J. L. BROWN

County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Fresno

By /s/ Ray Starks
Deputy

CALJIC

No. 21561 INSTRUCTIONS REQUESTED BY THE PEOPLE Page 2

[ ] 320	[ ] 408	[ ] 603	[ ] 704	[ ] 941
[ ] 322	[ ] 409	[ ] 604	[ ] 801	[ ] 942
[ ] 322-A ALT.	[ ] 426	[ ] 606	[ ] 806-A	[ ] 943
[ ] 322-B	[ ] 428	[ ] 607	[ ] 809,810 (2 pgs.)	[ ] 971
[ ] 323	[ ] 501	[ ] 621	[ ] 811	[ ] 973
[ ] 324	[ ] 502 ALT.	[ ] 622	[ ] 812	[ ] 974
[ ] 327	[ ] 503	[ ] 623	[ ] 821	[ ] 974-A
[ ] 327-A	[ ] 505,506	[ ] 624	[ ] 822	[ ] 975
[ ] 328	[ ] 507	[ ] 625	[ ] 823	[ ]
[ ] 331,331-A, 331-B	[ ] 510	[ ] 625-A	[ ] 824	[ ]
[ ] 340	[ ] 513	[ ] 654	[ ] 825	[ ]
[ ] 340-A	[ ] 521	[ ] 655	[ ] 826	[ ]
[ ] 341	[ ] 525 ALT.	[ ] 657	[ ] 827	[ ]
[ ] 342	[ ] 526	[ ] 658	[ ] 829	[ ]
[ ] 343	[ ] 527	[ ] 659	[ ] 931	[ ]
[ ] 344	[ ] 591	[ ] 701	[ ] 932	[ ]
[ ] 345	[ ] 592	[ ] 701-A	[ ] 933	[ ]
[ ] 401	[ ] 592-C	[ ] 703	[ ] 934	[ ]
[ ] 402,402-A	[ ] 601	[ ] 703-A	[ ] 938	[ ]
[ ] 406	[ ] 602	[ ] 703-B	[ ] 939	[ ]

Also such other instructions as may be submitted herewith.

Dated: MAY 10, 19 66.

James L. Duncan

Attorney(s) for THE PEOPLE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF FRESNO

THE PEOPLE OF THE STATE OF CALIFORNIA, People

vs.

WALTER FOSTER and JOHN HENRY ORICE, Defendant(s)

No. 21561

INSTRUCTIONS REQUESTED

By THE PEOPLE

CALJIC

People _____ respectfully request(s) that the Court give the jury the following ~~Defendant~~ numbered instructions from CALJIC (check instructions desired)

[X] 1	[ ] 30	[ ] 71.31	[ ] 115	[ ] 229-B	[ ] 302-F	
[X] 2	[ ] 30-A	[ ] 71.31	[ ] 115-A	[ ] 231	[ ] 303	
[X] 3	[ ] 31	[ ]	[ ] 115-B	[ ] 233	[ ] 305	
[X] 5	[ ] 32	[ ] 73	[ ] 116,116-A	[ ] 233-C	[ ] 305-A	
[X] 6	[ ] 32-A	[ ] 73-B	[ ] 117	[ ] 233-D	[ ] 305-AA	
[X] 8	[ ] 34 ALT.	[ ] 75	[ ] 201,202	[ ] 233-E	[ ] 305-B	
[X] 9	[ ] 35	[ ] 76	[ ] 201 ALT.	[ ] 234	[ ] 306 (3pgs.)	
[ ] 9-A	[ ] 36	[ ] 77	[ ] 201-A	[ ] 235	[ ] 306-A	
[X] 10	[ ] 39,39-A	[ ] 78	[ ] 202-B	[ ] 236	[ ] 306.1 (2 pgs.)	
[X] 21,22	[ ] 41	[ ] 78-B	[ ] 202-D	[ ] 238	[ ] 306.1(a)	
[X] 23	[ ] 51	[X] 91	[ ] 202-E	[ ] 238-A	[ ] 306.2	
[ ] 24	[X] 52 (2pgs.)	[X] 91-E	[ ] 203	[ ] 238-B	[ ] 308	
[ ] 26	[ ] 53	[ ] 91-F	[X] 210,A,B,C	[ ] 240	[ ] 308-A	
[ ] 27	[ ] 54	[ ] 93	[X] 210-D	[ ] 241	[ ] 308-B	
[ ] 27-A	[X] 54-A ALT.	[ ] 101	[ ] 210-E	[ ] 241 ALT.	[ ] 309	
[ ] 29	[X] 54-B	[ ] 102	[ ] 210-EE	[ ] 260	[ ] 310	
[ ] 29-A	[ ] 54-C	[ ] 111	[ ] 220	[ ] 261-C ALT.	[ ] 311	
[ ] 29-B	[ ] 56	[ ] 112	[ ] 221	[ ] 301	[ ] 311-A	
[ ] 29-C ALT.	[ ] 71.01	[ ] 113	[ ] 226	[ ] 302	[ ] 317	
[ ] 29-D	[X] 71.11F. (See below)	[ ] 114	[ ] 226 ALT.	[ ] 302-A	[ ] 317-A	

Robbery
Deprive the owner of his property

FILED
MAY 17 1966
J. A. BROWN, CLERK
DEPUTY

In the Superior Court of the State of California
In and for the County of Fresno

The People of the State of California,
Plaintiff,

vs.

WALTER FOSTER,
Defendant.

No. 21561 Dept. FIVE

VERDICT
P. C., Sec. 1151

WE, the jury in the above entitled action, find the defendant, WALTER FOSTER, guilty of VIOLATION OF SECTION 211 (a) OF THE PENAL CODE, ARMED ROBBERY, as charged in the Information filed in Proceedings No. 21561, and we fix the degree thereof as Robbery of the First (First or Second) Degree, and find that the defendant, WALTER FOSTER, was (Was or Was Not) armed with a deadly weapon.

Foreman.

Dated: May 17, 1966.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF FRESNO

DATE: May 24, 1966. COURT MET AT 2:00 P. M. DEPARTMENT NO. 5

PRESENT: HON. HAROLD V. THOMPSON, JUDGE RAY STARKS, DEPUTY CLERK

THOMAS R. NITT, REPORTER DAVID C. SWANSON, BAILIFF

PEOPLE OF THE STATE OF CALIFORNIA
VS.
WALTER FOSTER

COUNSEL FOR PEOPLE: E. Clarke Savory, District Attorney, by James L. Quaschnick, Deputy DISTRICT ATTORNEY
COUNSEL FOR DEFENDANT: Kenneth L. Maddy

☒ HEARING ON REPORT OF PROBATION OFFICER AND PRONOUNCEMENT OF JUDGMENT
☐ REVOCATION OF PROBATION

☒ FELONY (IN ___ COUNTS) TO WIT: Armed Robbery
☐ MISDEMEANOR

ACTION NO. 21561

PEOPLE REPRESENTED AS ABOVE AND DEFENDANT PRESENT WITH his COUNSEL

☒ REPORT OF THE PROBATION OFFICER IS RECEIVED AND CONSIDERED.
☒ DEFENDANT ARRAIGNED FOR PRONOUNCEMENT OF JUDGMENT.
☒ DEFENDANT STATES THERE IS NO LEGAL CAUSE WHY JUDGMENT SHOULD NOT BE PRONOUNCED.
☒ IS ORDERED.
☐ PROBATION IS ☒ DENIED ☐ REVOKED ☐ MODIFIED UNDER THE FOLLOWING TERMS AND CONDITIONS:
☒ DEFENDANT SENTENCED TO STATE PRISON FOR THE TERM PRESCRIBED BY LAW.
☐ EXECUTION OF SENTENCE IS STAYED UNDER THE FOLLOWING TERMS AND CONDITIONS:
☐ DEFENDANT SENTENCED TO SERVE ___ IN THE CUSTODY OF THE SHERIFF IN WHATEVER ADULT DETENTION FACILITY THE SHERIFF'S SCREENING BOARD MAY DESIGNATE.
☐ EXECUTION OF SENTENCE IS STAYED FOR THE PURPOSE OF GRANTING PROBATION, AND
☐ PROBATION IS GRANTED TO DEFENDANT FOR A PERIOD OF ___ YEARS UNDER THE FOLLOWING TERMS AND CONDITIONS:
  ☐ THAT DEFENDANT SERVE ___ IN THE CUSTODY OF THE SHERIFF IN WHATEVER ADULT DETENTION FACILITY THE SHERIFF'S SCREENING BOARD MAY DESIGNATE.
  ☐ THAT DEFENDANT PAY A FINE IN THE AMOUNT OF $ ___ AND PENALTY ASSESSMENT OF $ ___ PAYABLE THROUGH THE PROBATION OFFICER AT THE RATE OF $ ___ PER ___ COMMENCING ___
  ☐ THAT HE MAKE RESTITUTION IN THE AMOUNT OF $ ___ TO THE VICTIM, PAYABLE THROUGH THE PROBATION OFFICER AT THE RATE OF $ ___ PER ___ COMMENCING ___
  ☐ THAT ___HE REPORT TO THE PROBATION OFFICER EACH MONTH IN PERSON OR IN WRITING, AS THE PROBATION OFFICER MAY DIRECT AND THAT ___HE ABIDE BY ALL REASONABLE DIRECTIVES OF THE PROBATION OFFICER.
☐ DEFENDANT TO PAY A FINE IN THE AMOUNT OF $ ___, AND PENALTY ASSESSMENT IN THE AMOUNT OF $ ___ PAYABLE TO THE CLERK FORTHWITH.
☐ DEFENDANT CERTIFIED TO THE CALIFORNIA YOUTH AUTHORITY FOR POSSIBLE ACCEPTANCE, AND THE SHERIFF TO DELIVER SAID DEFENDANT TO SUCH RECEPTION FACILITY AS THE C.Y.A. MAY DESIGNATE, IF SO ACCEPTED.
☒ SENTENCES SHALL BE SERVED IN RESPECT TO ONE ANOTHER AS FOLLOWS: concurrent, AND IN RESPECT TO ANY PRIOR INCOMPLETED SENTENCE(S) AS FOLLOWS: concurrent
☒ SHERIFF IS DIRECTED TO DELIVER DEFENDANT INTO CUSTODY OF THE DIRECTOR OF CORRECTIONS AT THE CALIFORNIA Medical Facilit
  ☐ AT CHINO, CALIFORNIA ☐ WOMEN AT FRONTERA, CALIFORNIA
☒ DEFENDANT REMANDED TO THE CUSTODY OF THE SHERIFF.
☐ DEFENDANT ORDERED RELEASED FROM CUSTODY OF THE SHERIFF.
☐ BAIL BOND IS EXONERATED.
☒ REPORT OF PROBATION OFFICER IS ORDERED FILED.
☐ (OTHER)

☐ CONTINUED TO ___, 19___.

CRIMINAL MINUTES
SENTENCE
(2)

The minute order was duly entered in this and a copy placed in the file.
ATTEST: W. L. Brown
Clerk of the Superior Court of the State of California, in and for the County of Fresno
By [signature] Deputy

FILED
MAY 2 4 1966
J. L. BROWN, CLERK
By [illegible] DEPUTY

DEPT. No. FIVE CASE No. 21361

In the Superior Court of the State of California

IN AND FOR THE COUNTY OF FRESNO

ABSTRACT OF JUDGMENT

(Commitment to State Prison as provided by Penal Code Section 1213.5)

The People of the State of California,
vs
WALTER FOSTER,
Defendant.

Hon. HAROLD V. THOMPSON (Judge of Superior Court)
JAMES L. QUASCHNICK (Deputy District Attorney)
KENNETH L. MADDY (Counsel for Defendant)

This certifies that on the 24th day of May 1966 judgment of conviction of the above-named defendant was entered as follows:

In Case No. 21561 Count No. One he was convicted by Jury; on his plea of (Court or Jury)

not guilty (guilty, not guilty, former conviction or acquittal, once in jeopardy, not guilty by reason of insanity); of the crime of ARMED ROBBERY, and the degree thereof fixed by the jury as ROBBERY FIRST DEGREE

(designation of crime and degree, if any, including the fact that it constitutes a second or subsequent conviction of same offense if that affects the sentence and if under Section 209 of the Penal Code whether victim suffered bodily harm)

in violation of SECTION 211 (a) OF THE PENAL CODE

(reference to Code or Statute, including Section and Sub-Section);

with prior convictions charged and proved or admitted as follows:

DATE	COUNTY AND STATE	CRIME	DISPOSITION
11-5-1957	Fresno, California	ASSAULT WITH INT. TO COMMIT RAPE	California State Prison at San Quentin, Calif.
7-26-1960	Tulare, California	ROBBERY	California State Prison at San Quentin, Calif.

Defendant was (was not) charged and admitted being, or was found to have been armed with a deadly weapon at the time of commission of the offense, or a concealed deadly weapon at the time of his arrest within the meaning of Penal Code Sections

Defendant was not (was or was not) adjudged a habitual criminal within the meaning of Sub-division A or B (one or the other) of Section 644 of the Penal Code; and the defendant is not (is or is not) a habitual criminal in accordance with Sub-division (c) of that Section.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the said defendant be punished by imprisonment in the State Prison of the State of California for the term provided by law, said that he be remanded to the Sheriff of the ..... County of Fresno ..... and by him delivered to the Director of Corrections of the State of California at the place hereinafter designated.

It is ordered that sentences shall be served in respect to one another as follows: concurrent
(State whether concurrent or consecutive as to each count)

and in respect to any prior incompleted sentence (s) as follows: concurrent
(State whether concurrent or consecutive as to all incomplete sentences from other jurisdictions)

To the Sheriff of the ..... County of Fresno ..... and to the Director of Corrections:

Pursuant to the aforesaid judgment, this is to command you, the said Sheriff, to deliver the above-named defendant into the custody of the Director of Corrections at the Calif. Medical Facility at Vacaville, Calif., at your earliest convenience.

Witness my hand and seal of said court

this 24th day of May, 1966

J. L. BROWN, ... Clerk

by RAY STARKS, ... Deputy

SEAL

State of California,
County of Fresno

I do hereby certify the foregoing to be a true and correct abstract of the judgment duly made and entered on the minutes of the Superior Court in the above entitled action as provided by Penal Code Section 1213.

Witness my hand and seal of the said Superior Court this 24th day of May, 19 66

J. L. BROWN CLERK BY RAY STARKS DEPUTY CLERK
(County Clerk and Ex-officio Clerk of the Superior Court of California in and for the
..... County of Fresno .....

The Honorable Harold V. Thompson
Judge of the Superior Court of the State of California, in and for the ..... County of
Fresno

NOTE: If probation was granted in any sentence of which abstract of judgment is certified, attach a minute order stating the fact and imposing sentence or ordering a suspended sentence into effect.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF FRESNO

No. 21561

Filed, May 20, 1966, J. L. Brown, Clerk,
By [Illegible], Deputy.

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

vs.

WALTER FOSTER, DEFENDANT

NOTICE OF APPEAL

TO THE ABOVE ENTITLED COURT AND TO THE CLERK THEREOF:

You will please take notice that WALTER FOSTER, Defendant, hereby appeals from the judgment heretofore rendered on May 10, 1966.

Dated: May 20, 1966.

/s/ Walter B. Foster
Defendant

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF FRESNO

DEPARTMENT No. 5

Date: July 13, 1966 Court met at .....

Present: HON. HAROLD V. THOMPSON, Judge

....., Reporter

RAY STARKS, Deputy Clerk

DAVID C. SWANSON, Bailiff

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

vs.

WALTER FOSTER, DEFENDANT

NATURE OF PROCEEDINGS: MINUTE ORDER

ACTION NO. 21561

The Court directs that the Clerk's Transcript be corrected in the following particular, in that the CALJIC

Instruction No. 93 be shown to have been requested by the defendant.

The Court directs that the Reporter's Transcript be corrected at page 5 line 23 to substitute the word Clay for the word Grice.

[Certificates as to record and of service (omitted in printing)]

IN THE DISTRICT COURT OF APPEAL
STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

Appeal from the Superior Court of Fresno County
Honorable Harold V. Thompson, Judge

Department Five — May 25, 1966

No. 21561
No. 5 CR. 283

Filed, Dist. Court of Appeal-Fifth Dist., July 22, 1966,
James G. Huggins, Clerk,
Elizabeth M. Pliske, Deputy Clerk.

Filed, June 29, 1966, J. L. Brown, Clerk,
By [Illegible], Deputy

THE PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFF and RESPONDENT

vs.

WALTER FOSTER, DEFENDANT and APPELLANT

REPORTER'S TRANSCRIPT ON APPEAL

Appearances:

THOMAS C. LYNCH, Attorney General of the State of California; E. CLARKE SAVORY, District Attorney of the County of Fresno, by James L. Quaschnick, and, Frank E. Wells, Deputy District Attorneys, Attorneys for the People and Respondent.

WALTER FOSTER,
Defendant and Appellant,
IN PROPRIA PERSONA

ORIGINAL

[1] IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF FRESNO

DEPARTMENT FIVE

Before the Honorable Harold V. Thompson, Judge.

No. 21561

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

vs.

WALTER FOSTER and JOHN HENRY GRICE, DEFENDANTS

Fresno, California May 9, 1966

The above-entitled matter came on regularly for jury trial on the date above mentioned before the Honorable Harold V. Thompson, Judge of the Superior Court of the State of California in and for the County of Fresno.

James L. Quaschnick and Frank E. Wells, Deputy District Attorneys appeared for the People.

Kenneth L. Maddy, Esq., Security Bank Building, Fresno, California, appeared for the Defendant Foster.

M. Uchiyama, Esq., TW Patterson Building, Fresno, California, appeared for the Defendant Grice.

The following proceedings were had and testimony taken, to wit:

[2] Morning Session May 9, 1966

THE COURT: I want to state that we apologize for the late start because one of the attorneys was occupied in another court, and could not be here.

This is the case of the People versus Walter Foster and John Henry—how do you pronounce the name?

MR. UCHIYAMA: Grice.

THE COURT: All right. Are the People ready?

MR. QUASCHNICK: The People are ready, your Honor.

THE COURT: Are the defendants ready?

MR. MADDY: Yes, your Honor.

MR. UCHIYAMA: Yes, your Honor.

THE COURT: All right. Will you call the roll of the jurors.

(Whereupon the Clerk called the roll of the jurors.)

THE COURT: All right, at this time will all jurors stand and be sworn.

(The jury panel was sworn for jury voir dire.)

THE COURT: All right, will you fill the box.

(Whereupon the Clerk pulled and called twelve names and filled the jury box.)

THE COURT: All right. Ladies and gentlemen of the prospective jury, those in the audience as well as those seated in the jury box, the case here today is the case of the People versus Walter Foster and John Henry Grice. The People here are represented by Mr. Quaschnick and Mr. Wells. Mr. Uchiyama represents Mr. Grice, who is [3] seated to his right. And Mr. Maddy represents Mr. Foster, seated to his left.

The charge, and this is only a charge and only for the purpose of making it possible for you to answer intelligently any question that may be asked of you, the charge against these two individuals is that of armed robbery.

Now, as I stated, this is only a charge and will be explained more fully.

(Thereupon the Court and counsel voir dired the jury; Thereafter a jury was selected and sworn to try the case at issue.)

THE COURT: Will you read the information, Mr. Clerk.

THE CLERK: "Number two-one-five-six-one, Department Five. The People of the State of California against Walter Foster and John Henry Grice. In the Superior Court of the State of California in and for the County of Fresno. The District Attorney of the County of Fresno hereby accuses Walter Foster and John Henry Grice of a felony, to-wit: violation of section 211(a) of the Penal

Code, armed robbery, in that on or about the 25th day of January, 1966, in the County of Fresno, State of California, they did, while armed with a certain deadly weapon, to-wit: a gun, rob one, Joseph E. David." Defendants were heretofore arraigned and entered a plea of "Not guilty." And this is the time set for the trial of the matter.

THE COURT: All right. Do you have an opening statement to make, Mr. Quaschnick?

MR. QUASCHNICK: Yes, your Honor.

[4] THE COURT: At this time you may do so.

MR. QUASCHNICK: At this time, your Honor, the People make a motion that the witnesses in the case be excused from the courtroom.

THE COURT: All right. Will all witnesses who are to testify come forward and be sworn.

MR. QUASCHNICK: Any that the witnesses that the defendants may have.

THE COURT: Do the defendants have any witnesses?

MR. MADDY: I do not believe they are present in court.

THE COURT: All right.

(The following witnesses were sworn at this time: Bernice Hampton, Joseph E. David.)

THE COURT: All right, if you will remain out of the courtroom until you are summoned to testify as witnesses. You may leave at this time.

MR. QUASCHNICK: Thank you, your Honor.

(Thereupon Mr. Quaschnick made the People's opening statement.)

MR. MADDY: The defendant Foster reserves his statement until the opening of our defense.

MR. UCHIYAMA: Same with defendant Grice.

THE COURT: All right. You may call your first witness.

MR. QUASCHNICK: The People call Mr. Joseph David.

JOSEPH E. DAVID,

previously sworn, called by and on behalf of the People, testified as follows:

[5] DIRECT EXAMINATION

BY MR. QUASCHNICK:

Q Would you state your full name, please?
A Joseph E. David.
Q And what is your occupation, Mr. David?
A Western Union employee, operator. My classification is 'Late night manager, technician,' sir.
Q And how long have you worked for Western Union?
A Getting on to about thirty-six years.
Q Were you on duty the night of, or the morning of the Fifth of this year—the Twenty-fifth of January of this year?
A Yes. I reported at 12:01.
Q And what are your normal hours?
A From 12:00 to 8:00.
Q And they were your hours on that night of January 25?
A Regular tour.
Q Something unusual happen that night?
A Yes; I was held-up.
Q All right. Would you tell the jury and the Court what happened that night?
A Yes. About 12:40-12:39, I was in the process of sending a telegram and—actually, I was cutting a tape, in the vernacular of the business—and I saw the door open and these two colored men came in, Mr. Foster and Mr. Clay. Since then I have learned their names. And they came to the counter, the south end of the counter and they seemed to know about what they were doing, what they wanted to do.
[6] So I continued my work. And they seemed to be chatting together in low tones. And about the time I got through cutting the tape for this particular message I was sending, why, I see Mr. Foster raise his head. This was the first time I saw his face clearly.

Q Excuse me at this point, Mr. David.

A Yes?

Q Do you recognize anyone in this courtroom as being Mr. Foster?

A Yes. This is the gentleman over here (indicating).

Q And you are indicating to which gentleman?

A Beg your pardon?

Q You are indicating to whom?

A Mr. Foster.

Q The gentleman seated here in the white shirt?

A Yes; this is the man.

Q Will you continue, please.

A Yes. Excuse me I am a little nervous.

Q Let me ask you one more question. Do you recognize—You said there were two gentlemen that came in?

A Yes.

Q Do you recognize the other gentleman as being in the courtroom?

A He is not in the room right now.

Q All right. Thank you. Will you continue, please.

A Yes, sir. As I said, these two men were at the counter and I looked up from my work and watched them. And Mr. Foster raised his head and seem to go like this [7] (indicating), like that. And at that moment, why, Mr. Clay spoke up and said, "Here, I will do it," and I heard him say that, and took the blank and the pencil and proceeded to write on the blank. By that time I had finished cutting my tape and was—

Q Excuse me. What do you mean by "cutting a tape"?

A When you transmit a message with a machine it cuts a tape. That is a piece of paper with perforations.

Q I see.

A They are signals I have read from the form.

Q You were sending out a message?

A I hadn't sent it yet; I am perparing it for sending the message. The message actually isn't sent until it is put in a sending machine.

As I said, Mr. Clay then was deliberately, carefully writing the message and Mr. Foster was watching him and they seemed to be talking together a little bit. And

by that time I had cut the tape, finished the message tape and they still didn't seem to need my service. I proceeded to run it throught the machine. It takes about a minute and a half to cut a twelve or fifteen word message and it takes about a minute or a minute and a half to run it through the machine. And it seemed they both raised up and laid the pencil down and indicated they were ready for my attention. It so happened that at that identical point of time the tape had run through the transmitter and I was finished and I stamped my message with the date and time clock, and it was stamped at 12:41 AM. [8] So I stepped up to the counter and I said, "May I help you, please?" And I—at that—I noted at that time they had—whatever had been written at that time had been written on a Money Order blank. So I assumed they were wiring money and filled out the order to wire a Moneygram. And I observed, through experience, they had failed to put their name and address and phone number on the Money Order. That is absolutely required. We can't accept it unless—it is immaterial to us what address they write on the Money Order, but it is required, not on a telegram but on a Money Order blank; not on a telegram but on the Moneygram. So I said, "Will you please write your name and address and phone number." And Mr. Foster, in the meantime I should have told you, after Mr. Clay had written the message and they studied it, Mr. Clay shoved it back, shoved it back to Mr. Foster. And he read it and apparently they were in agreement, what they were going to wire—I thought so—he looked at me and he shoved it at me (indicating), shoved it at me and said, "Do what it say." So, the message blank, it was a Money Order blank, was reversed to me and I turned it around. Just about eight or ten words to the effect of, "This is a holdup," and two or three words I couldn't make any sense out of, but the last sentence says very clearly to me, "Go and open the case." So I read it and I looked up and looked down and read it again. And Mr. Foster said at that time, said to me, "You better do what it say." In the meantime—Why, I should have told earlier at this point when all of this first started they pulled revolvers on me, both had guns, small guns. Each

[9] of them had a gun in their right hand, both of them had revolvers. So Mr. Clay made some kind of indication, it seemed like, of some kind, and Mr. Foster put his gun away.

Now, Mr. Clay was standing there then holding the gun on me and said to me words to the effect go to the safe, or, get to the safe and bring your money box here. So I turned from them and walked back—See? And I stopped and looked back at them. I was about ten or twelve feet from them and the place was well lit and I could see clearly and I gave them—what you call, a hard look. I wanted to know in my mind and I wanted to impress on my memory who these two men were. And I see many people and people are easily forgotten in our business. Anyway, Mr. Clay, he was tense and perhaps a little nervous and he said to me, "Do that; open that safe." So I proceeded to the safe, opened the main door, the heavy door, and opened the first door and stooped down. And by that time I was out of line of vision. They could not see what I was doing. I opened—unlocked my safe door, which is in the chamber for the money doors, and my money door is the one—the only one I have a key for and the only one I can open. It is a metal can, black can, so, so, so, by so, (indicating size). I pulled it out and picked it up; carried it forward. And out counter stands about four and a half, five feet tall. They are standing here (indicating). There is a counter so wide (indicating) and a drop space and a smaller counter here (indicating). And I laid it down here and in the meantime these two [10] men have converged and they are very close to me. And I am right here and I carefully watch.

Incidentally, Mr. Foster told me, "Watch what you do." Indicating 'be careful what you do'. In other words, to me, I felt if I am not very careful I was going to get shot. So I opened the box.

Mr. Foster leaned over; Mr. Clay leaned over. Mr. Foster seems to be a little taller, seemed to have a better view of what I got. And my money was stacked. Over $500 that I had checked out and prepared, counted it into twentys and tens, just like a clerk, all money people do,

already to go the next night. Incidentaly, it is the first time I opened the safe since I come on at 12:00 o'clock. And Mr. Foster said, "Give me the large." And I handed it to him. He reached out and grabbed it and shoved it some place. And he makes some kind of a sign, some kind of a sign to Mr. Clay. And he left, slithered out through the door and was gone.

Mr. Clay is standing there and he says—he says to me—I am backing up; I am beginning to back up. In other words, I know to me as far as I was concerned I was in real trouble, because I had two of them on me and neither of them—they—they looked like they were hard and that they meant business; if necessary they would shot me if they had to. So I backed up. And I am like this (indicating) and I am about ten or twelve feet from the counter.

And M Clay says to me in a real mean tone and real angry tone he said, "You come up, up here." And I said [11] to him—I said, "No, sir. I am not coming up there. I am not going to let you hit me in the head with that gun." I said, "You can shot me." I said, "You can even kill me but I am not going to let you hit me in the head with that gun." And I am back about twelve feet.

And he comes to the end of the counter and there is an open space about this wide (indicating) with a swinging door, and the door swings open. I left it open on account of taxi drivers. I use taxi drivers for service during the night. And it is open and lower than his waist and he reached down with his hand and pulls it open and comes inside. Comes inside, inside of the office, and comes forward about three and a half feet.

Now, all of this time, a little earlier, I should have told you—excuse me. Before he said you come up here Mr. Foster had left. And I thought the phone rang. And we work by reflex, we answer the phone instantly no matter what we are doing; we drop what we are doing and answer the phone. And I thought it rang and I turned and I felt something sweep, something moving. And I turned around and Mr. Clay is standing here (indication) with his raised gun (demonstration). And it looked like he is either trying to strike me or trying to threaten me.

I don't know which but that is when I first began to move back. I was out of his reach by about four feet and he couldn't have quite have reached me to strike me. And then that is when I started backing up and shortly after, within a second—after I got back ten feet—and I was [12] frightened, naturally, and I was shocked—that is when he said to me, commanded me to come to the counter. That is when I told him I wouldn't let him hit me in the head. That is when he opened the swinging door.

I can't say that he was coming down at me like that (demonstration) but he was doing like this, see. And he was in a—his whole physique was in a—what you call, he was prepared to strike me just like I would strike you, to have been prepared.

Q Mr. David, excuse me for interrupting at this point.

A Yes.

Q Do you recall what Mr. Foster was wearing at this time?

A Well, when these gentlemen came in I would say Mr. Clay was dressed in street clothes, I would call him casual dressed.

Q Can you be more descriptive? Now, I am talking about Mr. Foster.

A Talking about Mr. Foster?

Q Yes.

A Excuse me. Mr. Foster came in first to the office and he had some kind of a turned down hat, it was—whatever it was it had a brim on it, completely covered his head. And the brim here was turned down, blanked down (sic) like sometimes you see fishermen wearing.

Q What about his clothing?

A He was wearing coveralls. As a matter of fact, I thought he was a garage man when he first came in. That was my impression, he was a garage man. He had coveralls—a frock I called it at the time—and—Incidentally—

[13] THE COURT: Just wait until he asks you the next question.

MR. QUASCHNICK: Q Mr. David, was there anything else he was wearing other than coveralls and shoes?

A Yes. At the time I looked at the blank and I ran my eyes up and down and I looked him in the eyes—he was very close to me—the coveralls was opened and he had a leather jacket on. Because my eyes—

Q What color was it?

A It was black.

Q How long did Mr. Clay stay in the office there after Mr. Foster left?

A Well, I would say he was with me not under three or four minutes; it would take three or four minutes. I should say right now he came into the office, he came forward three feet and was in a crouched position to come and get me. And I thought, as a matter of fact, he was going to come and beat me. Suddenly he either realized that his companion had gone with the money—he turned and spun, went to the door and run up the street because I could see his feet running.

Q Now, who are you talking about?

A I am talking about Mr. Clay.

Q Did you see what way Mr. Foster went?

A They both went north. The door is a glass door so I can see everything.

MR. QUASCHNICK: The People ask that—

THE COURT: Show it to them first.

MR. QUASCHNICK: All right.

[14] Q Mr. David, I show you this piece of paper. Do you recognize that?

A Oh, yes, this is the—

Q How do you recognize it?

A By the type of writing. I am accustomed for many years to look at writing.

Q Does it—Where have you seen it before?

A Well, I saw this—this is the note or the robbery command, holdup command that Mr. Clay wrote.

Q All right. And what is it written; what type of pen or pencil, or—

A It is written in—I don't have my glasses. It has to be written in pencil because they used a counter pencil.

Q Now it is on yellow paper, is that right?

A Sir?

Q What is the paper it is written on?
A Money Order; Wester Union Money Order, sending form of Money Ordergram.
Q Did you see who wrote it?
A Beg your pardon?
Q Did you see who wrote that?
A Mr. Clay wrote this note.
Q And I believe you testified after Mr. Clay wrote it he passed it back to Mr. Foster?
A Yes. In other words, why, they were in agreement. Mr. Foster is the gentleman who gave it to me and gave me the first order, "Do what it say."
[15] Q Okay. Thank you.
A That was left on the counter after they had both gone.
Q Would you read what the note says, please?
A Yes. It says, "This is a holeup," H-O-L-E-U-P. I didn't quite understand it at the time: It says something like, S-N-E-K, "snek more late," L-A-T-E. "So please open case," C-A-S-E.
Q All right. Now, that is what Mr. Clay wrote that night?
A Oh, definitely.
MR. QUASCHNICK: The People offer this into evidence as People's exhibit number one.
THE COURT: All right, it will be recived.

(Robbery note marked as People's Exhibit No. 1 in Evidence.)

THE COURT: We are not going to be able to conclude with this witness at this time. We will take out recess at this time. We will stand recess until 1:45. The jury will keep in mind the admonition not to discuss this case with anyone nor among themselves nor to form any opinion concerning it until it is submitted for decision. We will stand recessed until 1:45.
MR. QUASCHNICK: Thank you, your Honor.

(Thereupon the noonhour recess was had.)

[16] Afternoon Session May 9, 1966

THE COURT: The record will show the jurors are all present. Will the witness resume the stand. Have any other witnesses come into the courtroom in the meantime?

MR. QUASCHNICK: Yes, your Honor, Detective Biggers, who the People are requesting to remain in the courtroom as the chief investigative officer.

THE COURT: All right, he may do so.

JOSEPH E. DAVID,

resumes the witness stand for further:

DIRECT EXAMINATION

MR. QUASCHNICK:

Q Mr. David, when you speak will you speak just a little more slowly because I had a little trouble following you just before we recessed for lunch.

A I will try to, sir.

Q Now, you stated up to this point you were a victim of a robbery. Now, can you tell us what, if anything, was taken from the Western Union?

A Yes. Over five hundred—the exact figure is five hundred thirty-one—in there some place, in currency, all paper.

Q No coins?

A No. They declined the coins.

Q All right. You stated also that both defendants or that both people that came in and robbed you were carrying guns, is that correct?

A Yes, sir.

[17] Q Can you describe the guns for us, please?

A Yes. They were—they were small guns. And at one time earlier I had—they are odd looking little things, I called them. They looked more like collector's items—or anything else. I am not an expert on guns but they were tiny guns.

Q Can you describe the color of them or—

A Of course, they would be a dark metallic color, I would—I would like to think they appeared to be blue to my eyes.

Q All right. Have you seen the defendant Foster since this time?

A You mean since the robbery?

Q Yes.

A Yes. I saw him twice.

Q All right. Can you tell the jury when and where?

A I think that on—it was two or three days. I don't remember the exact date that I was told I was to come down to the police station. There would be a lineup. And in due time there was. So happened in the lineup there were three men and—

Q How many lineups?

A Two lineups altogether.

Q Now at the first lineup did you identify any person; was the defendant Foster in the lineup?

A I did not at that time say specifically.

Q Well, let me ask you first, was the defendant Foster in the lineup?

A Yes, sir, he was.

Q And did you identify him?

[18] A I didn't specifically say that is the man. I said I thought it was.

Q But did you make positive identification at this time?

A No, I did not speicfically postively identify.

Q All right. Then you were asked to view another lineup later?

A Yes. At the County Jail there was another lineup.

Q And about how much time after the robbery?

A Oh, I—it seems to me at least a week or ten days; now, perhaps longer.

Q This was the second lineup?

A Yes, the second time.

Q Was the defendant Foster in this lineup?

A Yes, there was five men. They brought five men in for the lineup.

Q And did you state whether or not Foster was the man who robbed you?

A Yes, I said I was convinced that he was the man. And I recall I signed some statement to that effect.

MR. QUASCHNICK: All right. I have no further questions.

CROSS EXAMINATION

BY MR. MADDY:

Q Mr. David, I will ask you some questions. I want to emphysize, also, that the court reporter has to take everything down. I will talk slow and if you will we will get along all right.

A Yes, sir.

Q Now, Mr. David, you testified as to these two individuals that came into the Western Union that night, is that correct?

[19] A (Witness nods head.)

Q About how long were they in there?

A It couldn't have been under ten or eleven minutes—total time—it could have been nine minutes total time.

Q I see. Who entered first, as you testified?

A Mr. Foster came in first.

Q All right. And will you tell us how he was dressed?

A Yes. As I said before I thought he was a garage man because he had coveralls on. I called it a frock at the time, and it seemed to be of a light color, some sort of a large plaid outline on it. And he had some kind of a hat on that—perhaps it was something you would see where they wash cars—the brim was close on his head. It had a brim and when he first came in his face was down, he kept his face down.

Q What kind of shoes did he have on, do you know that?

A When he ran I noticed—I would like to say he had a sort of a suede gray shoe on his feet like some members of the younger people are wearing now days.

Q All of these events are distinct in your mind at the present time?

A Yes, very distinct.

Q Did you make any notes or any—record your observations after this incident occurred?

A No, no. It's all pure memory.

Q Have you reviewed any transcript or any other document before you came to court today?

A No, not at all, sir.

[20] Q Have you reviewed them at all since the time of this incident?

A Since the time of what?

Q Of this incident?

A I recall—I recall reading something about Mr. Grice, and something during—while I was viewing photographs.

Q I see. Did you ever review the transcript of the preliminary hearing in this matter?

A By "preliminary hearing" I don't quite understand what you mean.

Q Do you recall we were in court once before, February 25, 1966, at which time there was a court reporter present in the Municipal Court?

A Not since then to my memory.

Q You never reviewed—

A I talked to no one or seen no one.

Q Did you talk with the District Attorney's Office at all since the preliminary hearing in this matter?

A I cannot positively—I don't think so.

Q Okay. Can you tell me how Mr. Clay was dressed that evening?

A Yes. At the time he had what I said was street clothes on. He had a hat. At the time I thought he was wearing, perhaps, some kind of a coat like this (indicating).

Q Suit coat, is that correct?

A Casual clothing like you see on so many young folks.

Q Did he have a tie on?

A That I cannot say absolutely.

[21] Q He had a hat on, also, is that correct?

A He had a hat, yes. As a matter of fact, they both had hats on.

Q You stated that you heard Mr. Clay state, "Here, I will do it." That is correct, when they walked up to the counter and began writing this message?

A When Mr. Foster appeared that he couldn't go ahead with what he started—I did not hear him; I already indicated how he grimaced—I also said that Clay showed irritation and said, "Here, let me do it," or, "I will do it for you."

Q Mr. Foster appeared nervous?

A He was tense.

Q All right. Trembling, is that correct?

A Not until—not until he pulled a gun on me; hand trembled.

Q All right. When was that? When was the first time you saw this gun?

A After he gave me the note or about the same time he pushed the note at me.

Q And who was holding a gun, you say—

A They were both holding guns, they both pulled guns on me about the same time.

Q You stated at that time you went back and got the money, is that correct, brought it forward?

A The money box; yes, sir.

Q And what was your testimony—Who picked up the money?

A I handed it—handed Mr. Foster the money.

[22] Q And he left the premises?

A He told me, "Give me the money."

Q And then he left the premises, is that correct, very quickly afterwards? And at that time is when Mr. Clay came at you with a gun, is that correct?

A Yes; that is when I told you I turned sideways to check the phones. I thought the phones were ringing but they weren't.

Q And today you testified you are not sure just exactly what he was trying to do with you, is that correct, whether he was going to hit you or not?

A I said I couldn't absolutely say that this man was swinging the gun down at me completely a full swing, a full arc. He was doing this at the time (demonstration).

Q He looked like he was going to kill you?
A It looked like he was trying to strike me. He gave me the impression that he was going to strike me.
Q Looked like a beast of prey?
A He went crazy. I said that before. He went mad.
Q And you said you thought, felt that you were going to be killed, is that correct?
A I felt I was going to get hurt real bad.
Q The man you identified as Mr. Foster was not in the place at that time?
A No, he had gone. He spoke in a soft—what speaking he did he spoke in a soft voice.
Q Now, you are sure about these guns?
[23] A I am positive.
Q You are positive as you sit here today there were two guns?
A Yes. That was my original statement, that was the original statement that I made to the officers when my memory was still fresh and that is what I remember what I felt at the start, I was under shock.
Q Was your memory better on February 25, 1966, than it is today?
A Well, I have a very good retentive memory. It is part of my work.
Q February 25th is considerably closer to this incident than it is today, is that correct?
A Yes, it would be.
MR. MADDY: I want to refer to a transcript, on page 8, gentlemen.
MR. WELLS: What lines, counsel?
MR. MADDY: Lines 18—
THE WITNESS: May I ask my wife to bring my glasses to me?
MR. MADDY: Yes.
Q Read line 18, about the middle of the line, to line 20.
A Where is line 18—Oh, I found it. Well, there was—
Q Suppose you start at line 15. I will read it to the jury. You just read lines 15 to 22, that is your testimony.
A Read line 15?
Q Read lines 15 to 22, just to yourself. Then I will ask you to read—Have you completed?

A Yes.

Q Then I will ask you to read lines 25 and 26.

MR. QUASCHNICK: I am going to object to the in-
[24] troduction of this into evidence, your Honor; it does not pertain to the direct examination.

THE WITNESS: Pardon?

THE COURT: Well, let me see that. I have not seen the transcript.

MR. MADDY: I have my copy. I don't know if the original is on file.

THE COURT: Well, I do not know whether it is impeaching or not. The jury can decide that.

MR. MADDY: Did you sustain the objection, your Honor?

THE COURT: No; overruled the objection.

MR. MADDY: I will read it:

> "A Now, he says to me, he shoved the blank at me and I read it and looked at him. Studied him careful and he says, "You better do what it says," and he's nervous and he's trembling and Mr., Mr. Clay then reaches over and takes the revolver in his hand. And he stands back and he says words to this effect, very true, I believe, "Get to that safe and bring me the money box, bring it here." Shortly before that—"

Then at 25:

> "Well, he really—well, he did. He, he really took it out of Mr. Foster's hand, right hand. He had it in his hand."

Q It is your testimony here today there were two guns, or, did Mr. Clay reach over and take the gun from Mr. Foster's hand?

[25] A Well, really now, if I were permitted to say apparently Mr. Clay was telling Mr. Foster to put his gun away.

Q Just answer my question. Were there two guns or one gun?

A There was two guns, sir.

Q So your testimony of February 25th was incorrect?
MR. WELLS: I object—
THE WITNESS: May I explain—
THE COURT: Well, that testimony does not contradict what he says here in any respect.
MR. MADDY: I believe he answered the question.
Q Do you have an explaination for that?
A Yes, if I may be permitted to give one. My wife called my attention to the fact—
THE COURT: No.
THE WITNESS: I am sorry.
THE COURT: Just explain the answer. The question was: Were there two guns or whether you ever said there was one gun.
THE WITNESS: Yes, I said there was one gun but I was confused afterwards.

MR. MADDY:

Q After when? After the incident was over?
A Yes.
Q You were confused as of February 25th, 1966?
A Yes, sir.
Q Is that correct?
A Yes, sir.
Q Are these events clearer in your mind today?
A Yes, sir.
[26] Q Now about this lineup that you testified that you were at; the first lineup you could not identify Mr. Foster, is that correct?
A I refused to—to make a positive statement.
Q All right. Did you see Mr. Foster immediately after that lineup?
A I asked if I could see—speak to him.
Q And they brought him to the office—
A And—
Q —and who was in the office?
A Mr. Kiehl and a gentleman from the District Attorney's Office, I forget his name, a younger man.
Q And you had some conversation with Mr. Foster at that time, is that correct?
A Yes. We sat across from each other.

Q And you still did not identify him at that time, is that correct?
A Yes—I didn't say.
Q You were not sure at that time?
A Pardon me?
Q You were not sure at that time?
A I—truthfully—I was not sure.
Q All right. And that was one or two days after this incident occurred, is that correct?
A Yes, sir.
Q All right. Now, you stated a week or—Strike that. Let's go back. Do you know who the other two men were in the lineup one or two days after this incident occurred?
[27] A No.
Q Had you ever seen either one of them before?
A No.
Q Can you describe them for us?
A You mean the first in the City Hall when there were just three men in the lineup?
Q That is correct.
A They were short men, smaller men.
Q How short would you say?
A They were maybe five-five, five-six, something in there some place.
Q Both of the other two men were of that height, is that correct?
A Very close.
Q What would you say Mr. Foster was in height?
A Definite close to six feet.
Q He was in the lineup with the other two men?
A Yes, he was on the right side.
Q Any other discription of the two men you can give us, of the other two men that you saw?
A Well, they seemed to have hats; one a mustache.
Q And did Mr. Foster have a hat on during the lineup?
A No, he didn't have a hat on, he had a leather coat on.
Q Who called you to come down and view the lineup?
A I couldn't say right now. Probably Mr. Kiehl.
Q What did he say when he called you?

A Asked if it was convenient for me to come down. [28] They wanted me to look at some men.

Q Said they thought they had arrested the man that pulled the robbery?

A I don't think he made that specific statement. He merely asked me to come down.

Q That is the entire substance of the conversation that you recall?

A That I recall.

Q He didn't say that they had the man?

A He didn't specifically say that they had the man.

Q Did they give you the name of the individuals as they stood up there that day?

A I don't recall that. I don't believe so because they would have named all three of the men.

Q Do you recall whether they told you the names or not?

A No, I don't think so.

Q And a week or ten days later did you have any occasion to go to the District Attorney's Office or have any conversation with any other police officer between the time you viewed the first lineup and the second lineup?

A I don't recall. I don't think so, sir; no, sir.

Q All right. And the second lineup, how many people were there?

A There was five.

Q Were there any of the same men there in the second lineup that were in the first lineup?

A I picked out the same man I picked out in the first lineup.

Q Were the other two men in the first lineup there in [29] the second lineup?

A I would say no. I think I saw—Well, in other words, five county prisoners.

Q So the defendant Walter Foster was the only man that was in the second lineup that you saw in the first lineup, is that correct?

A Yes, sir, I am almost certain of that.

Q And you also had occasion after the first lineup to go into the office with him and talk with him in the presence of the District Attorney's Office, is that correct?

A I talked with him shortly after the first lineup right after I saw the man in the first lineup.

Q Do you recall how he was dressed in the second lineup?

A Yes, sir. I made a mis-statement to you earlier—to you. You asked me at this time if he had a leather coat on and I said, "Yes." He didn't. He had a leather coat at the first lineup. In the second lineup they were five men and they were all dressed in ordinary fatigues.

Q You mean the blue fatigues?

A Yes. I have been wanting to correct that all the time.

Q Anything else you told me that you want to correct?

A I believe not—Only to the fact that I stated, I saw this same leather coat projecting out from underneath the coveralls—that is the leather coat I saw when he was at the counter when it was open and I observed the zipper teeth, the ring at the bottom and I observed the flange material sticking out from the edge.

[30] Q That is at the time of the lineup—

A At the time of the robbery.

Q You observed the individual that you identified?

A No—evidence that I added today.

Q That was added since the preliminary hearing?

A Today; yes, sir.

Q Anything else you want to add today that you haven't added or didn't testify to?

A Yes. I wanted to point out that—Mr. Foster seemed to be—I described him as a ashen gray man as compared to Mr. Clay. Mr. Clay is what you call a coffee brown. Mr. Grice, is of course, quite dark, very dark. Where as Mr. Foster would—I describe what I call a light complexed man. There is a contributing factor to such a statement because the background when I look out of the office is absolutely a total darkness there. There are no lights across the street from me.

Q Okay. Now, since the preliminary hearing we had on February 25th you added the fact there are two guns now; then you added the fact there was a black leather jacket under the coveralls of the man you described as Mr. Foster.

A Yes.

Q And you want to change the original description that you gave of Mr. Foster of ashen gray, is that correct?

A Well, that was my original statement.

Q I see. I don't think I have any other questions.

CROSS EXAMINATION

BY MR. UCHIYAMA:

Q Mr. David, calling you attention to the day of this [31] robbery did you see the defendant Mr. Grice, seated next to me?

A I am sorry, sir, you will have to speak louder.

Q Okay, fine. Calling your attention to the day of this incident, January 25, 1966, when you say this robbery occurred, when two Negro persons entered your—the office—did you see the defendant Grice, here?

A No, no. I know nothing about this young man. I never, to my knowledge, I have never seen him before in my life. As a matter of fact, I was told later he was in the lineup at the County Jail but I didn't know of course.

MR. UCHIYAMA: No further questions.

REDIRECT EXAMINATION

BY MR. QUASCHNICK:

Q Mr. David, there has been some new testimony on your part that wasn't related at the preliminary hearing earlier this year. Are these things you have thought of since the robbery and you didn't get a chance to bring out at the preliminary hearing?

A Yes. This information is many weeks old.

Q Uh huh.

A I called you once but you were busy.

Q Uh huh.

A And I was going to tell you about this.

MR. QUASCHNICK: Okay, fine

MR. UCHIYAMA:

Q Is it your testimony you have never seen this gentleman before, here (indicating), today?

[32] A To my knowledge, no.

Q Was he present at the preliminary hearing, February 25?

A Yes, yes, at the preliminary. What do you mean? Where was that held?

Q In the courtroom, this courthouse here.

A Yes. In other words, these two attorneys were there and these two gentlemen were there (indicating).

Q You do recall seeing him once before at least, is that correct?

A Yes, in the courtroom, yes.

Q All right, but you do not recall seeing him in the lineup, is that correct?

A I wouldn't know him in the lineup.

Q Do you recall whether he was there?

A I remember now because—yes—well, I saw him in the lineup. I know him now as having been in the lineup.

MR. UCHIYAMA: I just wanted to be clear on that. That is all the questions I have.

THE WITNESS: Uh huh.

THE COURT: All right, you may be excused.

MR. QUASCHNICK: People have no further questions.

THE COURT: All right, you may step down.

MR. WELLS: People call Mr. Clay.

Is there any objections to allowing this witness to remain in the courtroom, that is, Mr. David?

THE COURT: No; he has testified. Perhaps you [33] would want to pass that exhibit to the jury. They can pass it amoung themselves.

MR. UCHIYAMA: Your Honor, on behalf of the defendant Grice at this time we will object to any testimony of this defendant (witness Clay) in reference to defendant Grice and reserve the right to have it stricken from the Record if it is not tied up.

THE COURT: All right. Your motion will be noted.

MR. UCHIYAMA: Thank you.

MR. WELLS: Mr. Clay.

JAMES B. CLAY,

called by and on behalf of the People, first being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WELLS:

Q Mr. Clay, will you state your name for the Record, please?

A J. B. Clay.

Q And your address?

A 2129 Compton (sic), Compton, California.

Q All right. Mr. Clay, will you speak loud and clear so that the jury may hear and understand your testimony, please. Now, I recall—or, I refer your attention to the night of January the 25th of this year. At that time did you have occasion to see either of these defendants in this matter?

A Yes, I did.

Q And which defendant did you have occasion to see?

A John Henry Grice and Walter Foster.

Q You saw them both?

A Yes.

Q If you saw one of them first which one of them did you see?

[34] A I seen Walter Foster first.

Q Had you ever seen Walter Foster before that time?

A Yes, I have.

Q Had you ever talked to Walter Foster before that time?

A No.

Q Where did you see Mr. Foster on that day?

A Down in Chinatown.

Q What was the occasion, Mr. Clay?

A I seen him?

Q Yes.

A On the 25th I was—I got off of work and I went down in Chinatown, parked on the street. Foster passed by. And I asked him some questions about some girls. And we started conversation.

Q Where do you work or where did you work at that time, Mr. Clay?

A At that time I worked in the Del Webb Townhouse.

Q What time did you get off work that day?

A 4:00 o'clock.

Q Where did you go after you got off work?

A I first went home and went to Gong's Market, grocery market, and then I came back and went to Chinatown.

Q Now, did you spend any time with Mr. Foster that day after you met him?

A Yes, I did.

Q And can you tell us what you did?

A Well, starting from that day we started drinking and I went up to his house that—his room.

Q What kind of a house is this?

[35] A It is a rooming house. He got a room there.

Q And what side of town is that on?

A On the east, I guess.

Q All right. Now, at that time were you living in Fresno?

A Yes, I was.

Q And what side of town were you living on at that time?

A On West 219 Whites Bridge Avenue.

Q What time did you get to his house?

A About 5:30.

Q Where did you go when you got there?

A We went up to his room.

Q And what, if anything, occurred in his room?

A What occurred in his room?

Q Yes; if you could just tell the jury exactly what happened.

A Well, we—conversation were about girls at first; we were drinking. Kind of passing a bottle of liquor.

Q Continue.

A We continued to drink and drink and later on up in the night he asked me would I drive him downtown. Would I like to make $50 for driving him downtown to Western Union. And I said, "Yes." And he said all I had to do was drive there. It only take a couple of min-

utes and he give me $50. So during that night John Henry Grice soon showed up.

Q Incidently, Mr. Clay, how did you get to this rooming house of Mr. Foster's?

A He direct me there from Chinatown.

[36] Q Did you have a car?

A Yes.

Q Whose car was it?

A Mine.

Q Was he riding with you in the car?

A Yes, sir.

Q All right. Now about what time was it in the evening that he offered the proposition to you, can you give us your best estimate?

A Somewhere after 5:00.

Q Well, approximately what time did you get to his room?

A Between 7:30 and 8:00.

Q Was it sometime after you arrived at the room that he offered this proposition to you?

A Yes.

Q All right. What, if anything, occurred after he offered this to you?

A Will you break that—

THE COURT: Well, you started to tell us where you met Mr. Grice.

THE WITNESS: I met Mr. Grice during—about 11:30 that night, approximately, I guess, at Walter Foster's house; he came over.

MR. WELLS:

Q You say Mr. Grice came into the room?

A Yes.

Q And was there any conversation between you and Mr. Grice and Mr. Foster at that time?

A No, there wasn't; they had a brief conversation outside the room.

Q Did you overhear it?

A No, sir, I didn't.

Q You did hear them talking, though?

A Yes, sir.

[37] Q Was this just prior to Mr. Grice coming in?
A Pardon me?
Q Was this just before Mr. Grice came into the room?
A Yes.
Q Now, after Mr. Grice came in the room what, if anything happened?
A Mr. Grice came into the room; Mr. Foster introduced me to him and then they left, went outside and had a conversation. And during that time I were in the room. I couldn't overhear what they was saying. And they returned about five minutes later.
Q Go ahead.
A And they returned. Foster started dressing, he changed clothes, and took about four or five minutes, I guess.
Q What did Mr. Foster put on?
A He put on some coveralls.
Q Anything else?
A He changed shoes and put on a hat.
Q And can you describe the hat?
A He put on a large black large brimmed hat, broke down over his face.
Q When you saw Mr. Grice in the room that night was that the first time you had ever seen him?
A Yes, to my knowledge.
Q After Mr. Foster changed his clothes what happened?
A He said, "Let's go."
[38] Q Did you go?
A Yes, sir. We went down—
Q Excuse me. You left the room then?
A Yes.
Q Where did you go?
A We left the room; went downstairs and got into the car.
Q And who is "we"?
A Mr. Foster and Mr. Grice.
Q And yourself?
A Yes.
Q Was there any conversation on the way down to your car?

A No.

Q When you arrived in your car who got behind the wheel?

A I did.

Q Did the other two get into the car?

A Yes.

Q Where did they sit?

A In the front.

Q Who sat in the middle?

A Mr. Grice.

Q Was there any conversation at that time?

A Not with me; between them.

Q Approximately what time was this?

A About the—little after midnight.

Q And what was the conversation between Mr. Foster and Mr. Grice?

A I can't recall.

Q What did you do then, if anything?

A I took his directions and drove down to the Western Union.

Q You drove down to the Western Union?

[39] A Yes.

Q And this was at whose directions?

A Mr. Foster.

Q About how far was this from the rooming house of Mr. Foster's?

A About a mile or so.

Q And when you got down there what did you do?

A When we got down there—before we left the rooming house I was told to drive him down there. But, after we arrived at the Western Union I were told to go in.

Q Who told you to go in?

A Mr. Foster.

Q And while he told you to go in did he do anything unusual?

A Yes. He got out and give me a gun.

Q He gave you a gun?

A Yes.

Q Did he tell you anything else at that time?

A He told me when I get inside to write a note that this is a holdup, open the safe and hurry up.

Q Did you get out?
A Yes.
Q What happened when you got out?
A I got out and he went in first and I went behind him.
Q What did Mr. Grice do when you got out?
A He got under my driving wheel.
Q Did you leave the engine running?
A Yes.
Q Were the lights on or off.
A On.
Q What happened next?
A We went inside.
[40] Q Who went in first?
A Foster.
Q Did you follow him?
A Yes.
Q Did you observe his hands as you went in the Western Union?
A Yes, I did.
Q Where were these?
A He had his right hand in his pocket.
Q Did you observe anybody in the office?
A Yes, I did.
Q How many people?
A One man.
Q Where was he located?
A He were sitting in a chair.
Q Was he behind the counter?
A No, up from the counter.
Q All right. What happened?
A We got inside. Mr. Foster pretended to write a note and then he told me to write. And I wrote a note.
Q What did you write?
A I wrote this is a holdup, and what else I don't know.
Q I show you People's Exhibit No. 1, Mr. Clay, and ask you if you can identify it?
A Yes, this is the note.
Q Did you write that note?
A Yes.

Q Would you read it to us, please?

A "This is a holdup" and the rest, I—"more later, so please open the safe." I got nervous.

Q You were nervous?

A Yes.

[41] Q What did you do with that note after you wrote it?

A Turned it around and gave it to the gentleman when he came up.

Q Who gave it to the gentleman?

A I did.

Q And at the time this note was handed to the gentleman did you note anything unusual in regards to Mr. Foster?

A Yes, he had pulled a pistol.

Q Pulled out a pistol?

A Yes.

Q What did he do with it?

A He pointed it at that gentleman there from Western Union.

Q Are you referring to Mr. David here in the courtroom?

A Yes, I am.

Q Was anything said to Mr. David at this time?

A He told him to get him some money, or something other—I don't remember his exact words.

Q Who said that?

A Walter Foster.

Q Did Mr. David say anything?

A He said, "Don't shot me."

Q What happened then?

A He backed up and Walter Foster told me to pull my gun out.

Q Walter Foster told you to pull your gun out?

A Yes.

Q You didn't have your gun out up to that point?

A No.

Q You observe Mr. David go anyplace?

A Yes.

[42] Q Tell us where.

A He went to the safe and brought back a box containing some money.

Q Was that box opened in front of you?
A Yes.
Q Was Mr. Foster present?
A Yes.
Q Did you see what was in it?
A There was some money.
Q Can you describe how it was?
A It was large amount of money.
Q And did you observe what Mr. Foster did, if anything?
A Yes. He took the money and put it in his pocket.
Q Did you take any money?
A No, I didn't.
Q What happened then?
A Walter Foster run out, went out the door, and told me to scare him up.
Q What did you do then?
A I raised my gun away and looked and he had left and I run out.
Q Who had left?
A Walter Foster.
Q Was it at that time that you run out?
A Yes.
Q When you got outside what did you observe, if anything?
A When I got outside Grice was still in the car; Foster had gotten inside.
Q What did you do?
A I got in the car.
[43] Q Was there any conversation when you initially got in the car?
A Yes.
Q What?
A Walter Foster told me, "See how easy that worked? All white folks think colored folks look the same. They never know who it was."
Q Did Grice drive the car away?
A Yes, he drive away.
Q Could you describe how he drove away?
A He took off smoothly from the Western Union until he made a turn then he speeded up.

Q Where did you go?
A Went back to Walter Foster's house.
Q Did you go directly to Foster's home?
A Yes.
Q Who got out there?
A Grice and Foster got out.
Q And what did you do?
A They got out and he told me to give him his gun back.
Q Did you?
A Yes.
Q What did he do with it, do you know?
A I left him standing on the street and he still had the gun in his hand.
Q Were both of them standing on the street when you left?
A Yes.
Q Did you leave immediately after they got out?
[44] A Yes.
Q Was there any conversation at that time?
A No, no more. He had told me to meet him at the Hollands Club the next day.
Q Did he say why?
A Yes, he said he would give me $50.
Q So what did you do then?
A I went home. I drove around about ten minutes and then I went home.
Q What did you do when you got home?
A Undressed and went to bed.
Q Did you do anything the next day after you got up?
A Yes—

MR. MADDY: Objection, your Honor, incompetent, irrelevant, and immaterial.

THE COURT: I do not know whether it is connected up. Objection overruled.

MR. WELLS:

Q Continue.
A The next morning I got up, dressed, made some coffee; I look out the window and turned on the radio.

MR. MADDY: I now object—

MR. WELLS: There is further testimony here.

THE COURT: The objection is overruled if it is connected up.

MR. WELLS:

Q What did you do then, Mr. Clay?

A Later on in the afternoon I went to the Hollands Country Club to where I met Walter Foster. And I asked [45] him about the $50 he promised me. And he said, "No. Soon the heat would cool down," or something, he would give it to me and he bought me a beer and I left.

Q When was the next time you saw Walter Foster?

A In court.

Q At the preliminary hearing this matter?

A Yes.

Q Were you arrested prior to that time?

A What?

Q Were you arrested before you went to—

A Yes, I was.

Q Before you saw him?

A Yes.

Q All right. Did you testify at the preliminary hearing in this matter?

A Yes.

Q Were you subsequently after your arrest charged with the offense of armed robbery in this matter?

A Yes.

Q And did you plead guilty to that?

A Yes.

Q Has anyone made you any promises to testify here today?

A No.

Q Has anyone at any time made any promises to you to testify at any time?

A No.

Q Has anybody from the District Attorney's Office or other law enforcement office made any threat to get you to testify?

A No.

Q This purely voluntary on your part?
[46] A Yes, it is.
Q Has anybody at any time made any threats to you in regards to this case.
A Yes.
MR. MADDY: Object, your Honor, incompetent, irrelevant, and immaterial—hearsay.
THE COURT: Objection overruled.

MR. WELLS:

Q Would you tell us who made threats, what those threats were, and when the threats were made?
A Walter Foster told me that—"Do not talk." And I have some phone calls.
Q When did Mr. Foster tell you not to talk?
A Coming over to the preliminary hearing.
Q Was this after you were arrested?
A Yes.
Q And you were on your way to the preliminary hearing from the jail?
A Yes.
Q Did Mr. Grice ever make any threats to you?
A Yes.
Q What did he say?
A He told me if I were asked how I knew him, through my landlady; that he had taken her out.
Q Do you know from your own knowledge whether he has ever taken your landlady out?
A No.
Q What is your landlady's name?
A Irma L. McClendon.
MR. MADDY: I didn't hear that name.

[47] (Record read.)

MR. WELLS:

Q And what is your address, Mr. Clay, on the west side at least at the time this occurred?
A 219 Whites Bridge Avenue.
Q How long have you lived in this area?
A Ever since '64.

Q Mr. Clay, this gun that you pulled out in the Western Union office was this a different gun than you observed Foster pull out at the time?

A What do you mean?

Q Do you understand the question?

A Would you revise it again?

Q Let me rephrase it. How many guns were involved in the robbery?

A Two.

Q Who had them?

A Walter Foster.

Q At the time of the robbery who had them?

A I had one and he had one.

MR. WELLS: All right; your witness.

CROSS EXAMINATION

BY MR. MADDY:

Q Mr. Clay, what time did you get off work on January 25, 1966?

A 4:00 o'clock.

Q You went directly to Chinatown, is that correct?

A No.

Q Where did you go after you left work?

A I got off work and went to Gong's Market next door.

Q All right. And what did you do at Gong's Market?

[48] A I bought a little bottle of wine.

Q And from there where did you go?

A I went home.

Q And what did you do at home?

A I went in and I pulled off my coat and went back out and went down into Chinatown.

Q All right. How were you dresed when you went to Chinatown?

A I had a green sweater, light hat and blue jeans.

Q Shirt underneath the sweater, is that right?

A No.

Q And what did you do when you got to Chinatown, Mr. Clay?

A I parked on the street.
Q How long did you set there?
A About an hour or more.
Q Did you see anybody you knew?
A Not—I seen people I knew but not by their names.
Q I see. Did you talk to anyone?
A No one but Foster.
Q So the only conversation you had with anyone during that first hour was Foster, is that right?
A That is right.
Q And can you tell us again how you struck up your conversation with Mr. Foster?
A Yes. I was sitting on the street and he passed by and I asked him about some girls.
Q I see. You never spoken to the man before, is that it?
[49] A That is correct, correct.
Q But you had seen him before, is that right?
A Yes.
Q And you stated Mr. Foster got into the car with you, is that correct?
A That is correct.
Q How long did you both stay there?
A I can't say; I don't recall.
Q Half an hour, an hour?
A A little over an hour.
Q Little better than an hour. Anybody come by that spoke to you, either one of you?
A A gentleman passed by and he talked to us. Nobody I knew. He knew him.
Q Nobody that you knew passed by that spoke to you?
A No.
Q Lot of people on the street that day? Now, you said Walter Foster told you to drive him over to his rooming house, is that right?
A I asked him about some girls and he told me to go to his place and he get me a girl.
Q All right. He told you the way to get there, is that right?
A Yes.

Q You don't know where the place is?
A No.
Q All right. You don't know where it is today, is that right?
A Yes, I know where it is now.
Q I see. Did you go back and check up or how do you [50] know where it is today?
A I been there.
Q You have been there?
A Yes.
Q Since the time of the preliminary hearing?
A No.
Q All right. When did you go, then?
A When he directed me over there.
Q He told you how to get over there, is that correct?
A Yes.
Q This is on January 25th?
A Yes.
Q What time did you arrive, Mr. Clay?
A I can't recall the exact time.
Q Okay. Did you know anyone at the rooming house?
A No.
Q Anyone speak to you at the rooming house?
A No.
Q You and Walter walked up to his room, is that correct, is that your testimony?
A Yes.
Q No one saw you?
A Not that I know of.
Q Was anyone there when you came into the room?
A No.
Q All right. Now, your testimony is that you sat there sometime, I believe, you said 7:30 to 8:00 o'clock until at least 11:30 or midnight, is that right?
A That is right.
Q Anybody come up there at that time during that period of time?
A Yes.
[51] Q And who was that?
A John Henry Grice.
Q Anyone else come up there?
A No.

Q Did Walter Foster's landlady come up there during that period of time?

A No.

Q Did you speak to her or see her at all during this evening?

A No.

Q All right. Now you stated that sometime during that evening Walter Foster changed clothes. What did he have on when you first met him at Chinatown?

A He had on a black leather jacket.

Q What else?

A dark trousers and a shirt.

Q Okay. And you stated that he changed his clothes; into what—how would you describe he was dressed when you left that evening?

A He changed into some coveralls, zipped all the way up.

Q What color were they?

A Blue I think.

Q All right. He took off his leather jacket and black pants and sliped into the coveralls, is that right?

A I don't know whether he took them off or not.

Q You don't know?

A No.

Q Did he have a hat on?

A Yes.

Q He had a wide brimmed hat and he pulled it down over his eyes is that correct?

A He had it broke down.

Q And he told you he wanted you to drive him down [52] to Western Union, is that right?

A That is correct.

Q Nothing else?

A Nothing else said about what was going to happen at the Western Union. He just told me—asked me whether I would like to make $50 and I said, "Yes."

Q You didn't ask him how?

A No.

Q You were going to drive to Western Union?

A Yes.

Q You know where Western Union was?

A No.

Q Walter Foster told you how to get to the Western Union?

A Yes. He directed me from the rooming house.

Q When you got to the Western Union your testimony was that Walter Foster then told you that he wanted you to go in, is that right?

A That is right.

Q And it is your testimony that he gave you a gun at this particular point, is that correct?

A Yes.

Q Did he tell you what to do with the gun?

A Yes.

Q What did he tell you?

A He told me to scare the guy up.

Q Did he tell you that outside or inside?

A He told me that inside.

Q Before you got inside did he tell you what to do with the gun?

A Yes.

[53] Q He told you to put it in your pocket?

A I put it in my pocket.

Q You did that without having to be told?

A Yes.

Q And then you both went inside, is that right?

A Yes.

Q When you got inside did he tell you to write a note at that time or did he tell you to write the note before you went inside?

A He told me what to write before we went inside.

Q Okay. And when you got inside you wrote the note?

A Yes.

Q And you handed it to this gentleman, Mr. David, right here?

A Yes.

Q You do anything to him when you handed him the note?

A No.

Q Walter Foster nudged you and tell you to hand him the note?

A No.

Q You just did that on your own?
A I just turned around and handed him the note.
Q At this time you said Walter Foster had his pistol out?
A Yes.
Q Did you ever pull your pistol?
A Yes; when he told me to.
Q He told you to pull the pistol?
A Yes.
Q Then did he tell you to pull it out when you handed the note to him?
A No.
[54] Q The gentleman went back and got some money and brought it up there and Mr. Foster took it, and that is your testimony, and then he left?
A Yes.
Q Before he left, did Mr. Foster tell you to scare this man up, is that right?
A That is correct.
Q Were you mad at this time?
A No.
Q Were you enraged?
A No.
Q Did you feel like killing anybody at this time?
A No.
Q Did you have a smile on your face?
A No.
Q You stated that you were nervous, is that right?
A That is correct.
Q And it is your testimony that you just raised your hand in the direction of that man right here (indication)?
A I raised the gun up.
Q Did you swing at him?
A No.
Q Did you make any gesture or movement towards him at all?
A No.
Q Where was he when you raised your hand up?
A He was behind the counter.
Q How far away was he?

A A couple of feet.
Q About as far as you are from the gentleman, the court reporter here?
A Yes—farther.
Q And there was the counter between you, is that correct?
[55] A Correct.
Q How much farther away?
A He was a little farther from here to that table.
Q This table?
A Yes.
Q Was he looking at you when you raised your hand up like that?
A Yes.
Q Did you ever get close enough, between two or three feet of him with your arm up in the air?
A No.
Q Did you say anything to him when you raised your arm up?
A No.
Q Now, as I understand your testimony Mr. Foster told you to do that, is that right?
A That is correct.
Q Okay. Then I believe you—as soon as you raised your arm up you noticed Mr. Foster gone and you ran out?
A Yes.
Q And you got outside Foster told you it was difficult to identify Negro people, is that right?
A He said they think we all look alike.
Q I see. Is there anything now that Mr. Foster told you during that evening that you haven't told us about?
A Not that I can recall.
Q And you stated on your way over to the preliminary hearing Mr. Foster told you not to talk?
A Yes.
Q Did he say anything else to you walking over there?
A No.
Q Was anybody present at this time?
[56] A Yes; some more prisoners.
Q Some more prisoners?

A Yes.
Q There was a bailiff present, wasn't there?
A Yes.
Q What was the charge given you, Mr. Clay?
A What?
Q What charge did you plead guilty to?
A I don't—

MR. WELLS: Objection, your Honor, irrelevant, immaterial.

MR. MADDY: It was brought out on direct examination.

THE COURT: Objection overruled.

MR. MADDY:

Q What charge did you plead guilty to, Mr. Clay?
A Armed robbery.
Q Armed robbery, or, robbery force and fear?
A They charged me with armed robbery at first.
Q All right. What did you plead guilty to?
A Armed robbery.
Q Did you plead guilty to armed robbery, force and fear—isn't that the fact, they reduced the armed robbery—

MR. WELLS: I object to counsel's interpretation the charges were reduced if in fact they were; there is no evidence to support that. I think it is in bad faith—

MR. MADDY:

Q Do you know what you pled guilty to?
A Yes.
Q Have you been sentenced yet?
A No.
Q You are awaiting the sentencing, is that correct?
[57] A That is correct.
Q Did you have a hearing set for sentencing a week ago?
A Yes.
Q It was continued, wasn't it?
A Yes.
Q You state you never been promised anything, is that right?
A That is correct.

MR. MADDY: That is all the questions I have.
THE COURT: Let me ask you this:

Q When you say that outside the Western Union there that Mr. Foster handed you a gun did Mr. Grice see Mr. Foster hand you that gun?
A Yes, he did.
THE COURT: I have no further questions.
MR. WELLS: No further questions, your Honor.
THE COURT: Mr. Uchiyama:

CROSS EXAMINATION

BY MR. UCHIYAMA:

Q Mr. Clay, prior to January 25th did you see Mr. Grice at any time?
A Yes.
Q Did you know him?
A No, I didn't.
Q You know what his occupation is?
A No.
Q You saw him before the 25th of January?
A I am not sure but I think I have seen him on the streets before.
Q You didn't know him?
A No.
Q How many days prior to this was it?
A What?
Q How many day prior to January 25th did you see Mr. Grice?
[58] A How many days?
Q How many days before—weeks, months, or—
A I only met him just once.
Q What day was that?
A January 25.
Q That is the only day that you met him?
A Yes.
Q You didn't know him before then?
A No.
Q Now you stated that you got off work at 4:30 in the afternoon, is that correct?
A Got off work at 4:00 o'clock.

Q 4:00 o'clock. And then you went over to Gong's Market to pick up some wine or something?
A Yes.
Q What did you pick up actually?
A I picked up some Triple Jack.
Q How much of it?
A Four-fifths of a pint.
Q How much?
A Four-fifths of a pint.
Q And you say you went home, is that correct?
A That is correct.
Q You drank that at home?
A Pardon?
Q Did you drink that Triple Jack, or whatever it was, at home?
A No. I had never taken it out of my car.
Q You just left it there in your car?
A Yes.
[59] Q And you said you were parked in Chinatown and sitting on the street, is that right?
A That is right.
Q And what were you doing at this time?
A I was sitting in my car.
Q Were you drinking?
A No.
Q Never drank anything?
A No.
Q When did you commence drinking or did you drink?
A When I met Foster; he got in the car.
Q And Foster—You never seen him before, is that correct?
A I had seen him on the street before.
Q What?
A I had seen him on the street before.
Q You knew who he was?
A No.
Q All right. And what did he do; he get into the car with you and start talking?
A We started talking and he got inside.
Q All right. And what did you do inside of the car?
A We started drinking the wine I had.

Q All right. And how much of it did you drink?
A We drank it together.
Q What?
A We drank it together.
Q Yes. Well, how much did you drink, both of you together?
A About half of it.
Q About half of it. And then you went over to, you say, Foster's rooming house, is that right?
[60] A That is right.
Q And were you drinking at this time at the apartment house?
A Yes.
Q Or the rooming house. What time did you get to the rooming house?
A I don't know the exact time.
Q Approximately what time was it?
A Before 8:00, I guess.
Q Before 8:00 . And then what were you doing from before 8:00 until 11:30 or 12:00 o'clock?
A Drinking.
Q Drinking?
A Yes.
Q What were you drinking?
A Whisky.
Q Whisky. And where was the whisky; where did you get the whisky?
A Foster bought it before we left Chinatown.
Q And how much whisky did he buy?
A He bought a pint.
Q And about 11:30 or 12:00 o'clock had you drank up the wine and whisky?
A Yes.
Q And you say that John Henry Grice came in around 11:30 or 12:00 o'clock?
A Somewhere along that time.
Q Had you drank all the wine and whisky by that time?
A Yes, when he came in we had dranken it.
Q What?

[61] A When he came in we had dranken everything.
Q Had drank everything?
A Yes.
Q Both of you drank out of this bottle of wine and bottle of whisky?
A Yes.
Q Each had a drink each time?
A Yes.
Q You drank about half of this?
A Yes.
Q And is it normal that you drink this much in—
A No.
Q —an afternoon?
A No.
Q Now you said you never met John Henry Grice except that particular day?
A That is correct.
Q Now, when you the three of you left this rooming house and you say you were driving your automobile?
A Yes.
Q All right. Now, and—he told you to go to the Western Union?
A He directed me there, yes.
Q And you say how long you have been living here?
A Every since '64.
Q And you didn't know where Western Union was?
A Yes, I knew where it was, but not how to get to it from over there where he stays.
Q Well, Western Union is on this side of town, is that right?
A Yes.
Q You never been over this side of town before?
[62] A No more than working.
Q What?
A In working.
Q Well, you say you were working at the Del Webb Townhouse?
A Yes.
Q And you say Foster was the one who directed you over here to the Western Union?
A Yes.

Q Is Western Union located on a one-way street?
A Yes, I think it is.
Q Do you know what street that is?
A No.
Q Now, you say that Foster handed you the gun, is that right?
A That is right.
Q That is when you got to the Western Union?
A Yes.
Q All right. And you say you were on the driver's side, Grice was in the middle, and Foster was on the other side, is that right?
A That is right.
Q And Foster, as you parked there, did Foster tell you to get out of the car?
A He told me to get out, I was going in with him.
Q What?
A He told me I was going in with him.
Q With him?
A Yes.
Q Meaning Foster?
A Yes.
Q All right. When did that happen?
A After we got to the Western Union and parked.
[63] Q All right. Now, when you came to Western Union, did you know what was going to happen?
A No, I didn't know what was going to happen.
Q Did you know why you were coming to Western Union?
A No, he just told me he give me $50 to drive him down there.
Q And you knew where Western Union was, didn't you?
A I pass by it going home.
Q And you think $50 to drive him from where he was living to Western Union was quite a bit of money?
A I knew something was going on wrong.
Q You knew that you were going to have some kind of trouble, didn't you?
A I didn't know that he was going to make me go in with him.

Q All right. Then when you—He gave you the gun outside of Western Union, isn't that correct?
A That is right.
Q And he told you to come along, is that right?
A Yes.
Q At that time you said you had a gun, is that right?
A He gave me the gun.
Q He gave you the gun and you followed him into Western Union?
A Yes.
Q And when you walked into that door of Western Union you knew what was going to happen?
A Yes, I knew then.
Q And yet you followed him in there?
[64] A Yes.
Q Now, you heard—you know at any time during the time you were in the Western Union did you get behind the counter of the Western Union?
A No.
Q Never did?
A No.
Q Now, when you said you were told by defendant Foster to see him at the Holland Country Club—
A Yes.
Q Next day?
A Yes.
Q All right. And you went over there?
A Yes.
Q And was defendant Foster there?
A Yes.
Q Was he there before you were there or what?
A He were there when I got there.
Q When you got there. Where was Grice?
A I didn't see him anymore.
Q You knew where Grice lived, did you not?
A No.
Q You say you wrote this note and handed it—and that was—that was shown to Mr. David the Western Union operator?
A Yes.

Y You wrote that?

A Yes.

Q All right. And were you told what to write on that?

A Yes.

Q When were you told what to write on it?

[65] A I were told on the way going in and after we get inside.

Q All right. And what were you told to write?

A This is a holdup, open the safe, hurry up and open the safe.

Q And this was going over there in the automobile?

A After we got there.

Q After you got there on the way in?

A Yes; and after we got in.

Q And after you got in?

A Yes.

Q It wasn't in the presence of this defendant here then (indicating defendant Grice)?

A No.

MR. UCHIYAMA: Nothing further.

REDIRECT EXAMINATION

BY MR. WELLS:

Q Just to clear the record up. And now this day that you quit work and went to Chinatown, that was Monday, January 24th?

A Yes.

Q And this robbery occurred that night, then, actually the early hours of the morning of the 25th?

A Correct.

Q Mr. Clay, did you—without giving me the conversation—did you have occasion to talk to your mother before you were taken into custody in this matter?

A Yes, I did.

Q And as a result of that conversation did you make any decisions?

A Yes.

Q What did you decide?

[66] A I called my mother and told what I had did.

Q Now, don't tell me what she said, just tell me whether you made any decision after you talked to her and what happened.

A I had made the decision to turn myself in.

MR. MADDY: Object, your Honor, incompetent, irrelevant, and immaterial.

THE COURT: Yes, I believe so.

MR. WELLS:

Q All right. Now I have one further question. Defense counsel Mr. Maddy asked you whether you had been sentenced yet in this matter you have pled guilty to. I asked you has anybody made any promise about this matter to get you to testify here?

A No.

MR. WELLS: All right. That is all.

MR. MADDY: No further questions, your Honor.

MR. UCHIYAMA: Nothing.

THE COURT: We will take our recess at this time. The jury will keep in mind the admonition not to discuss this case with anyone, nor to discuss it amongst yourselves, nor to form any opinion until it be submitted for decision. We will stand recessed for fifteen minutes.

(A short recess was had.)

THE COURT: The record will show the jurors are all present. You may call your next witness.

MR. QUASCHNICK: Thank you, your Honor.

The People will call Detective Biggers.

THE COURT: All right.

[67] BILL C. BIGGERS,

called by and on behalf of the People, first being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. QUASCHNICK:

Q Would you state your full name, please?

A Bill C. Biggers.

Q And what is your occupation, Mr. Biggers?
A Police Officer, City of Fresno.
Q And what is your duty with the police department?
A Detective Division.
Q All right. On January 30 approximately 10:45 PM did you have occasion to go to the Holland Club?
A Yes, sir.
Q And for what purpose?
A To pickup defendant Mr. Grice.
Q You mean to arrest him?
A To arrest him, yes.
Q And what were you going to arrest him for?
A For armed robbery of the Western Union.
Q And what was the basis for your arrest?
A I had arrested Mr. Clay prior and then in the investigation he had told me about Mr. Foster and also had described Mr. Grice to me, his physical description and had told me Mr. Grice was a roommate of Mr. Foster's. And through further investigation by the other detectives, why, Mr. Grice was named as a suspect. And I arrested him for it.
[68] Q When did Mr. Clay tell you this?
A On the night of the 25th when I arrested Mr. Clay.
Q How long after the arrest of Mr. Clay did Mr. Clay implicate Mr. Grice and Mr. Foster?
A We questioned him probably for an hour or an hour and a half at police headquarters and he told us the entire story of the armed robbery and who his accomplices were. He named Mr. Foster but he did not know Mr. Grice by name. He described him but—and said it was a roommate of Mr. Foster's.
Q Now, did you see Mr. Grice at the Holland Club that night, January 30, I believe it was?
A Yes.
Q And did you place him under arrest?
A Yes, sir. He was singing in the Country Club and we waited until he finished his song and we walked up to the orchestra pit and placed him under arrest.
Q All right. Did you have a conversation with him at that time?

A Yes. We told him he was under arrest and advised him of his rights to remain silent; advised him of his right to have an attorney; advised that anything he said could be used against him.

Q Did you interrogate him or question him regarding his whereabouts on January 25th—24th, or the early morning hours of January 25th?

A He said at this time, "I knew you were looking for [69] me on armed robbery." That he had a couple of phone calls and also one of the detectives had called his sister and told her that we were looking for him and he should give himself up. And he said he was out of town, he just got back in town from Oakland; and he had been out of town for the week.

Q That would include the day of the robbery?

A Yes.

Q And what did where did you go after—What did you do after you placed him under arrest?

A We brought him into the detective division and questioned him in regards to this, his whereabouts, where he had been. And at this time he stated on the evening prior to the robbery, which would be the evening of the 24th, that he had been downtown to Chinatown area—I believe it was between 8:00 and 10:00—he was at Chino's and also the Silver Star. I am not familiar where Chino's is. The Silver Star is 1300 block Tulare. And from there he had gone to the Playland poolroom, which is in the 900 block of "F" Street. At about 10:30 he went over to the Greyhound Bus Depot, read some magazines and watched the girls that came in on the buses. About 1:30 he went to the El Trocadero which is on the corner of Tulare and "F".

Q What is the El Trocadero?

A Cafe and bar. And he stayed there only about a half hour. From there he went to the—he stated he met some girl while at the El Trocadero about 2:00 o'clock. I don't recall her name, but he had loaned her some money, or, a couple of bucks, something to this effect. [70] Anyway, from there he went back to the Greyhound where he stayed about 6:00 o'clock in the morning.

Q So at the time of his arrest he told you he was out of town and later at police headquarters he told you he was spending it, at least the early hours, either at the Greyhound Bus Depot or at the El Trocadero, is that correct?

A That is correct.

MR. QUASCHNICK: I have no further questions.

MR. MADDY: No questions.

CROSS EXAMINATION

BY MR. UCHIYAMA:

Q Lieutenant Biggers, you stated that defendant Grice was a suspect in view of the fact of the statement made by the accomplice Clay, is that correct?

A That is right.

Q Now aside from the statement of Clay do you have any other independent evidence for implicating this defendant?

A Now I don't personally and I don't know whether the other detectives did, because you realize I work 4:00 to midnight; and I do not know what work was done during the day. As I stated, Mr. Clay had told me it was a roomate of Mr. Fosters' who was the accomplice in the holdup. He described the man; the way he wears his hair, but did not name him. I put this in my report. And when I returned to work the following day Mr. Grice was listed by name on the police report as the third suspect in the robbery.

Q Yes. But, again, as far as the defendant Grice is concerned the only evidence or any information that you have implicating this defendant is the statement of Mr. [71] Grice, isn't that correct?

A That is correct.

MR. QUASCHNICK: You mean Mr. Clay?

THE WITNESS: Mr. Clay, yes.

MR. ICHIYAMA:

Q Now, at the time you made the arrest of the defendant did you learn what the occupation of the defendant was?

A He is a singer; he has told me.
Q At the various night clubs?
A Yes.
Q All right. Now the statement that he gave you in regards to being in the poolroom, at the Greyhound Bus Station, and at the El Trocadero, having loaned a girl approximately a couple of bucks or two dollars, has any of this statement been checked out?
A I didn't check it out, no.
Q Now, this defendant has been in custody all the time, isn't that correct, since the time he was arrested?
A I do not know.
MR. UCHIAYAMA: I see. I have no further questions.
MR. MADDY: May I ask one question?
THE COURT: Yes.
MR. MADDY: Did you arrest Mr. Foster?
THE WITNESS: No, sir.
MR. MADDY: No further questions.
MR. QUASCHNICK: The People have no further questions.
THE COURT: All right, you may be excused.
MR. QUASCHNICK: Okay, the People call Bernice Hampton.
THE COURT: Mrs. Hampton has been sworn.

[72] JULIA BERNICE HAMPTON,

previously sworn, called by and on behaf of the People, testified as follows:

DIRECT EXAMINATION

BY MR. QUASCHNICK:

Q Will you state your full name, please?
A Julia Bernice Hampton.
Q And what is your address?
A 41 North Calaveras.
Q Mrs. Hampton, have you ever seen either one or both of the defendants before today?
A Yes, I have.

Q Where have you seen them?
A They have a room at my rooming house.
Q And where is your rooming house?
A 473 North Calaveras.
Q Can you identify the defendants by name?
A Yes, I can.
Q And taking the first gentleman with the white shirt on, what is his name?
A Walter Foster.
A And this gentleman (indicating)?
A Johnnie Grice.
Q And what room does Mr. Foster have at your rooming house?
A Number three.
Q And what room does Mr. Grice have?
A Number one.
Q And where is the rooming house located?
A North Calaveras, 473 North Calaveras.
[73] Q Is that near Calaveras and Belmont?
A Belmont, yes.
MR. QUASCHNICK: Thank you; I have no further questions.
MR. MADDY: I have no questions, your Honor.
MR. QUASCHNICK: The People have no further questions.
MR. UCHIYAMA: I have one question.

CROSS EXAMINATION

BY MR. UCHIYAMA:

Q Mrs. Hampton, do you know what the occupation of Mr. Grice is?
A No, I do not.
Q Do you know what the hours are that he keeps?
A No, I do not.
Q You don't know any of his activities, what time he leaves or what time he comes?
A No. I do not stay there.
Q I see. All you know is they are occupants of your rooming house, is that right?

A That is right.
Q Do you know if they know each other?
A If John and Walter know each other?
Q Yes.
A No. I have seen them together but I do not know how well they know each other.
Q All right. Have you seen Mr. Grice—I mean at the night clubs?
A Yes, I have.
Q And what was he doing at the night clubs?
[74] A At the night clubs?
Q Yes.
A One time I heard him singing at a night club.
Q Wasn't he with a band?
A I suppose—
MR. QUASCHNICK: Object to this, your Honor, as being outside the scope of the direct examination.
THE COURT: Probably; objection—
THE WITNESS: I suppose—
THE COURT: —overruled. It has been answered.
MR. UCHIYAMA: I have no further questions.
MR. QUASCHNICK: People have no further questions.
THE COURT: You may be excused.
MR. QUASCHNICK: May counsel approach the Bench, your Honor.
THE COURT: Yes.

(Counsel and Court confer out of the hearing of the jury.)

MR. QUASCHNICK: People call Mrs. Middletown.
MR. UCHIYAMA: Your Honor. in behalf of the defendant Grice we wish to object to the testimony of this witness from the fact of what has been offered it no ways ties in this defendant and the jury be especially instructed that this evidence is not admissible as far as defendant Grice is concerned.
THE COURT: May I have a statement from the District Attorney's Office that the testimony does not relate to Mr. Grice?
MR. QUASCHNICK: Yes, your Honor.

THE COURT: All right. The jury will be instructed, then, that the testimony to come from this witness relates [75] only to the defendant Mr. Foster. Disregard it insofar as—

MR. MADDY: For the record, also, since I have been advised of what the testimony is going to be, I will state for the record, and also ask the Court to allow this to be a continuing objection to everything that is said by this witness, that this is incompetent, irrelevant, and immaterial, this is prejudicial against the rights of the defendant, and I will ask for a mistrial on the bases of her testimony—for the record, your Honor.

THE COURT: Well, the objection is overruled. I have not heard it yet.

MR. QUASCHNICK: Thank you, your Honor.

MARY ROSE MIDDLETON,

called by and on behalf of the People, first being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. QUASCHNICK:

Q Will you state your full name, please?
A Mary Rose Middleton.
Q And what is your occupation, Mrs. Middleton?
A I was a telegraph operator for Western Union.
Q And when was that?
A I just quit last June.
Q Were you employed by Western Union on July 4, 1960?
A Yes, I was.
Q And did anything unusual occur that night?
A Yes. I was heldup and robbed.
Q And do you recognize anyone in the courtroom that [76] was the robber?
A Yes.
Q And could you point him out for us, please?
A That boy over there on the end.
Q Would you—Do you know his name, by chance?

A Foster, Walter Foster.

Q All right. Indicating to the gentleman here with the white shirt (indicating)?

A Yes.

Q Now, what did you observe that night, and what time did you go to work first?

A I work 8:00 to 10:00 in the morning and 4:00 to 6:00 in the afternoon; those were on Sundays and holidays. In the morning I had noticed this Mr. Foster and another gentleman across the street walking, looking at the office and walking across the street. And I commented to a woman customer at the time, I said, "Well, there's a boy. There's something from out of town," meaning not Mr. Foster, the other man who was very well dressed, city dressed. And then at—when I opened the office again at 4:00 and about 5:30 these two boys came and Mr. Foster handed me a note and it said, oh, relative—this is a stick-up. And he did not have a gun; the other follow did.

Q There was a gun involved there?

A Yes.

Q The other fellow carried a gun?

A The other fellow had a gun stuck in the sleeve of his coat.

Q And what happened; what did you do?

A They both came around the counter in front of the [77] counter and they wanted me to open the drawer, which I did. And they took the money out of that and then they wanted the safe opened; and I opened the safe. But I could not open any of the drawers in there. Everybody has their own key for that.

Q Uh huh.

A And he—and they wanted the American Express orders that we have and I could not find the key for that compartment. And we just had one key and it was in with some papers. And then they took me in the washroom and—not this one but the other fellow—tied my legs with adhesive tape. And he was going at my arms and wrist when Mr. Fooster was out in front, you know, acting as a customer and said, "Someone is coming." So this other fellow untaped, unwrapped and took off the adhesive tape and I went out in front and waited on this customer.

And he was there and he had a young—oh, like a teen age boy—and this boy was standing back against the window and Mr. Foster was standing like he was a customer waiting for a money order or something outside the counter. And then Mr.—who was Robbie Robinson—he left and the teen age boy. And they asked me, the young man had asked me if I had a car. And I said I didn't; that my husband would call for me at 6:00 o'clock. So they took me back in the washroom and tied my hands, my wrists, and ankles again and were still waiting for my husband to show up. I imagine they wanted the car; I don't know what else for. And he was late and he didn't show up. So they left about twenty after six and they left me in the [78] washroom. And I wiggled my hands free.

THE COURT: Well, I do not think we need to go into that.

THE WITNESS: But, he definitely—

THE COURT: I think you have answered the question.

THE WITNESS: Oh.

MR. QUASCHNICK:

Q Did you report to the police depatrment?
A Oh, right away.
Q And he was apprehended was he?
A Yes.
Q And that is the person with the white shirt?
A Yes.
Q And do you recognize this defendant Mr. Grice at all?
A No.
Q He was not the other gentleman that was along?
A No.

MR. QUASCHNICK: All right. The People have no further questions.

CROSS EXAMINATION

BY MR. MADDY:

Q Mrs. Middleton, when did you state this happened?
A Fourth of July, 1960.

Q All right. At that time at the time you stated how were the two gentlemen dressed, that is each?

A Mr. Foster was dressed just like we are dressed in the valley, but the other man was all dressed up.

Q When you say just like here in the valley—I think [79] there is also some difference.

A Well, let's say a small town, holiday, short sleeved shirt.

Q Have a hat on?

A No, he didn't.

Q Have shoes or boots on?

A He had shoes on, I guess.

Q He had on pants?

A Uh huh.

Q Any jacket? Not on July Fourth.

A Not on July Fourth.

Q And the other gentleman was dressed in a suit, is that correct?

A Not a suit; a "T" shirt and a charcoal plaid suit coat and black pants.

Q Now, when they first walked in was the note written?

A Yes, it was.

Q It already had been written?

A That is correct.

Q Was this handed to you?

A Handed to me by Mr. Foster.

Q Was anything said?

A I think I said, "Oh, no," something like that.

Q Was anything said by either one of the gentleman?

A No.

Q At that time you stated they asked for the cash?

A Uh huh.

Q And you went to the cash box and got the cash?

[80] A My cash drawer.

Q Excuse me. And you have a cash box in the safe?

A In the safe.

Q And at the time the gentleman asked for the American Express—

A Money order.

Q Money orders, is that correct?

A Uh huh.

Q Did they ask for anything else at this time?
A No.
Q Is there any other types of items that are of value?
A No.
Q In other words, every Western Union office carries American Express checks?
A I believe so; I know we do.
Q In your experience?
A Yes.
Q And this is part of the—
A Service.
Q Service, right.
A Uh huh.
Q And these can be completed and negotiated to get cash for them, is that right?
A Yes.
Q And how many generally, in your experience, did you maintain down there?
A Oh, I think roughly around three or four hundred dollars.
Q A substantial amount, is that correct?
A Yes.
Q And at this time you said they took in—you in the washroom and you were tied up?
[81] A With adhesive tape.
Q And you were retained and asked to wait on a customer?
A When the customer came in he untied—unwrapped my feet.
Q And they made inquiry of your husband, when he was going to arrive?
A Yes.
Q And you were lead to believe they were waiting for the use of the automobile, is that correct?
A That is what I figured.
Q Any physical violence other than this tying you up?
A No, uh huh.
Q And you stated at that time this well dressed man had a gun, is that correct?
A Yes, he did.

MR. MADDY: I do not think I have any further questions.

THE COURT: All right, you may be excused.

MR. MADDY: I am going to renew my objection, your Honor, irrelevant, incompetent, and immaterial, and remote in time for the purpose it is admitted; it is incompetent, irrelevant, and is immaterial and does not meet the purpose that I believe it is intended. For that it is highly prejudicial to the defendant.

THE COURT: I think there is sufficient points of similarity to make it admissible. The objection is overruled.

MR. QUASCHNICK: Thank you, your Honor. The People will call Lieutenant Jump.

Mr. Baliff, will you get Lieutenant Jump? He is out in the hall.

[82] ROBERT T. JUMP,

called by and on behalf of the People, first being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. QUASCHNICK:

Q Will you state your full name, please?
A Robert T. Jump.
Q And your occupation, sir?
A Detective lieutenant Visalia Police Department.
Q And how long have you been a police officer?
A Approximately nineteen years.
Q Were you on duty on July 4th, 5th, and 6th, 1960?
A Yes, I was.
Q Did you have occasion to see the defendant, see either one of the defendants prior to that date?
A Yes, I know Mr. Foster.

THE COURT: Let me ask this: Is this testimony offered, likewise, solely against Mr. Foster?

MR. QUASCHNICK: That is correct, your Honor.

THE COURT: All right, the jury is so instructed

that it has no application to any matter relating to Mr. Grice.

MR. QUASCHNICK:

Q And when did you see the defendant Mr. Foster?

A Well, I knew the defendant prior to July 4, 1960, and my first contact with him after July 4th was July 5th of 1960.

Q All right. Will you tell about what brought about the contact that you had with him?

[83] A Yes, sir. Mr. Foster was arrested by me as a result of a robbery that occurred on July 4, 1960.

Q Where?

A At the Western Union office in Visalia.

Q All right. And after he was placed under arrest—Excuse me one moment, please.

May counsel approach the Bench, your Honor?

THE COURT: Yes.

(Counsel and Court confer out of the hearing of the jury.)

MR. QUASCHNICK:

Q Did you have a conversation with the defendant Foster?

A Yes, sir.

Q And would you tell the jury what the conversation was?

A Well, primarily it was concerning the robbery at the Western Union office that had occurred the day before. And in talking with Mr. Foster he subsequently admitted being implicated in this robbery.

Q Did he state all the particulars of the robbery?

A Yes, sir.

Q And did he implicate anyone else?

A Yes.

Q And do you see the other defendant here Mr. Grice; did you see him at that time?

A No, sir.

Q Have you ever seen the defendant Grice before?

A No, sir.

MR. QUASCHNICK: The People have no further questions.

Cross examine.

[84] CROSS EXAMINATION

BY MR. MADDY:

Q Lieutenant, you stated at that time on July 5th you took a statement from Mr. Foster, is that correct?

A Yes, sir, I did.

Q And—

A However, he refused to sign the statement.

Q Prior to taking the statement did you advise Mr. Foster of his constitutonal rights?

A No, sir, not at that time.

Q You did not?

A No.

Q You stated at that time he admitted this offense, is that right?

A Yes.

Q Were you present or did you arrest him at the scene of this offense on July 4th?

A No, sir, he was arrested the following day after the offense.

Q As far as your own personal knowledge you have no personal knowledge concerning any of the events that took place in the Western Union office in Visalia, is that correct?

A Yes, I do.

Q Other than what you have heard from someone else?

A That is right. The police report.

Q You have no personal knowledge—you didn't observe anything; you weren't on a stakeout or you weren't there to see what took place yourself?

A No, sir.

MR. MADDY: Your Honor, I move to strike Lieuten-
[85] ant Jump's testimony on the bases it is highly prejudicial and it is incompetent, irrelevant, and immaterial; same objection I have to Mrs. Middleton's testimony and ask for a mistrial.

THE COURT: Motion denied.

MR. MADDY: That is all the questions I have; thank you, lieutenant.

MR. QUASCHNICK: The People have no questions.

The People at this time have no further evidence and will rest.

MR. MADDY: Before you rest, Mr. Quaschnick—

THE COURT: This is a part of your case?

MR. MADDY: If your Honor please, I thought we were going to stipulate to it.

THE COURT: All right. Does defendant Foster have any witnesses he wishes to call?

MR. MADDY: Your Honor, we could at this time enter into the stipulation with the prosecution that concerning the case number two-one-five-five-three, People of the State of California against J. B. Clay, filed in the Superior Court on March 5, 1966, was an amended complaint charging him with violation of Section 211 of the Penal Code with robbery, force and fear.

THE COURT: All right; stipulation acceptable?

MR. WELLS: The People will accept that stipulation.

THE COURT: All right.

MR. MADDY: The defendant Foster rests.

THE COURT: Mr. Uchiyama?

[86] MR. UCHIYAMA: Your Honor, at this time in reference to the defendant Grice we wish to renew the objection to the testimony of accomplice Clay on the basis that—

THE COURT: Well—

MR. UCHIYAMA: —the matter we raised before.

THE COURT: Are you going to produce any other testimony?

MR. UCHIYAMA: We will put the defendant on.

THE COURT: I see. The objection is overruled.

MR. UCHIYAMA: At this time we call the defendant John Henry Grice.

JOHN HENRY GRICE,

called by and on behalf of himself, first being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. UCHIYAMA:

Q Will you state your full name, please?
A John Henry Grice.
Q And how old are you?
A Twenty-one years old.
Q And where do you live?
A 473 Calaveras.
Q Calling your attention to January 30, 1966, you heard—did you see Lieutenant Biggers, of the police department, who testified here?
A Yes, I did.
Q The officer that arrested you?
A Yes, sir, I saw him.
Q Was that at the Holland Country Club?
[87] A Yes.
Q All right. And at the time you were arrested were you informed of what you were arrested for?
A Yes, I was.
Q What was that?
A Armed robbery, suspicion of armed robbery.
Q Did he tell you who you were involved with?
A No, he did not at that time.
Q Now, did you tell him—Well, did you tell him that you were—you had heard they were after you, or something?
A Yes, I did tell him that.
Q What did you tell Officer Biggers when he arrested you?
A I told him—I was—I said something to this effect: That I was waiting or expected him to come and arrest me. I told him I was informed that I was supposed to be involved in a robbery. Early in the night I went to my mother's and—or my sister's and she told me that Jack Kelley called and some statement that he made, if I am guilty to give myself up, if not come down and get it cleared up.
Q Now, during this time what is your occupation?
A Music and other side lines, odd jobs.

Q What—when you say "music," what do you do?
A Well; I—my main occupation is singing for a living.
Q You sing?
A Yes.
Q And what are the hours that you sing?
A Well, it varies. I mean, most of the time usually [88] from 9:00 to 2:00.
Q Mostly at nighttime?
A Yes.
Q Now, did you tell the officer, at the time you stated you were looking for him, but, that you were out of town?
A I told him I had just got back from out of town. And I heard about this. But I didn't tell him I was out of town when this happened. If that is what he said I didn't tell him that.
Q The day they came to arrest you was on January 30, 1966, isn't that right?
A I am not positive. It was a Sunday night; I think it was the 30th or the 31st, I think it was.
Q Now, you were brought to the police station, is that right?
A Yes.
Q And you were told to tell—they told you you were supposed to be involved in an armed robbery on January 25th or early morning, late evening of the 24th or the early morning of the 25th, is that right?
A That is right.
Q And then you were asked where were you, is that correct?
A Yes.
Q And you told the officers where you were, is that correct?
A Yes, I did.
Q And that is what the officer referred to when you said about being at the Greyhound Bus Depot and the El Trocadero and so forth?
A Yes, he was correct.
Q Now, had you seen this other witness Clay before?
[89] A Well, I saw Clay at the Holland Country Club.
Q You saw him at the Holland Club?
A Yes.

Q He used to come there often?
A I only noticed him about twice I would say.
Q Did you know him?
A No.
Q Did you know Foster?
A Yes, I know Foster.
Q How do you know him?
A We were staying in the same rooming house.
Q That is where Mrs. Bernice Hampton is?
A Yes, that is correct.
Q And how long have you been at the rooming house?
A Approximately two months.
Q Before this incident?
A Before.
Q Now, did you in anyway take part in the alleged armed robbery of the Western Union?
A No, sir, I didn't.
Q When was the first time you saw Mr. Dayid?
A David?
Q Did you ever see Mr. David, here, before?
A This officer here?
Q The operator from Western Union; have you ever seen him before?
A The only time that I saw him was at the preliminary hearing.
Q The hearing?
A That was the only time I ever saw him.
[90] Q That was after the complaint was filed against you implicating you?
A That was after I was arrested and brought to the preliminary the first time.
Q Yes. Do you know if Mr. Clay was involved in the Western Union robbery on January 25th?
A I don't know anything about it.
MR. UCHIYAMA: I have no further questions.

CROSS EXAMINATION

BY MR. QUASCHNICK:

Q Mr. Grice, you stated your address is 473 North Calaveras?

A Yes, I did.

Q And you stated that you and the defendant Foster lived in the same rooming house?

A Yes, we do.

Q And when did you move into that rooming house?

A I can't remember the exact month.

Q Wasn't it in December of 1965?

A Yes, it was in this year.

Q Where did you live before that?

A I was staying with my mother at that time.

Q All right. When did you check out of the rooming house?

A I never did check out.

Q You stated you know Mr. Foster, is that correct, since you lived in the same rooming house?

A Yes—well, you know, like you would know a neighbor, not sociable.

Q Just an acquaintance?

[91] A Well, we have been out together once or twice before.

Q Has he ever been to your room?

A Yes, he has.

Q Have you ever been to his room?

A Yes, I have.

Q On the night of January 24th of this year were you at the defendant Foster's room?

A Would you repeat that question?

Q On the night of January 24th of this year were you in the room of defendant Foster?

A No, I wasn't.

Q Where were you the night of January 24?

A Well, I was downtown this particular night.

Q Where abouts downtown?

A Well, do you want me to give you just the whole—I mean it was at different places. Do you just want me to name just one place or all of the places?

Q Start with about 9:00 o'clock at night January 24th.

A Oh, 9:00 o'clock, I was at Chino's Poolroom and the Silver Star; this is on Tulare.

Q And what is the Chino's?

A It is a poolroom.

Q And the Silver Star?
A It is a bar.
Q Liquor store?
A No, a bar.
Q Bar. What time did you leave Chino's?
A Chino's? Well, see if I can explain this. I will say [92] it like this. They are right next dor to each other and I shoot pool for maybe thirty minutes and then I went to the bar and stayed for an hour; and then I went back to the poolroom and then went back to the bar and then I left.
Q What time did you leave?
A About 10:30.
Q And where did you go from there?
A To the Playland Poolroom right down the street.
Q And that is over in west Fresno?
A Well, it is Tulare and "F".
Q All right. And what did you do at Playland?
A Well, I played a few records. I didn't shoot no pool. Stayed there about forty-five minutes.
Q You stated you were a singer, is that correct?
A Yes.
Q Were you singing at all that night?
A No, I wasn't.
Q Were you unemployed, or, your night off?
A Well, I wasn't working. We don't work on a Monday night.
Q How long were you at the Playland?
A Forty-five minutes—maybe a little more.
Q And what time did you leave the Playland?
A It would have been twenty 'til 12:00 or 11:30, something about that time.
Q Where did you go?
A To the bus depot.
Q The Greyhound Bus Depot?
A Yes.
[93] Q And what did you do at the Greyhound?
A Well, same thing I usually do; I read magazines.
Q Did you buy any magazine?
A No, I didn't.

Q Stood at the rack and read magazines?
A I bought one book there, was a comic book.
Q All right. And how long were you at the Greyhound Bus Depot?
A I was there I would say at least a good hour.
Q And during this hour you read magazines?
A Well, not all the time. First—first when I came in I started out reading magazines and after that about twenty minutes I ordered a cup of coffee. And then—well, then I met two fellows come from Frisco going to Los Angeles and I had a conversation with them.
Q Who were they?
A I remember one of them first name was Chuck.
Q Had you ever seen him before?
A No, I hadn't.
Q You just met them for the first time that night?
A Yes.
Q Did you find out what their first names were?
A No. The only name I knew was Chuck.
Q Did you find out where they were living?
A No, I didn't—in Frisco.
Q In San Francisco?
A Yes.
Q And they were on their way to Los Angeles?
[94] A Yes.
Q And did they have a layover here in Fresno?
A No, they were just passing through.
Q I mean they were on the bus, is that correct?
A Waiting for the next bus.
Q And how long did you talk to them?
A Oh, about—a good forty minutes I am sure.
Q Do you see either one of them in the courtroom here today?
A Of the people I had conversation with—No, I—
Q Yes, Chuck and his friend?
A No, I don't.
Q Have you seen them since that day?
A No, I haven't.
Q What else did you do at the Greyhound Bus Depot?
A Well, after that I met, I spoke to one girl. And then I went back downtown.

Q Did you find out what her name was?
A Her name was Shawn. She is a relative to a friend that I know; she stayed in Fresno also.
Q And was she just passing through?
A Yes, she was.
Q And she—you just started a conversation with her?
A Yes, I did.
Q And you don't remember her last name?
A No, I don't. But I know her relatives.
Q And do you know where her relatives live?
[95] A Yes, I do.
Q Where do they live?
A They stay on—
Q Here in Fresno?
A They stay in Fresno.
Q And you can, you know where they live; you could go to their house and meet them?
A Well, their last name is Tupper, that is all I know.
Q You know what Shawn's last name is?
A No, I don't. I just know her by her first name. Their last name is Noel.
Q Now, is Shawn in the courtroom?
A No, she isn't.
Q Have you seen her since that day you talked to her, rather, that night?
A No, I haven't.
Q Did you talk to anyone else that night while you were at the Greyhound Bus Depot?
A No, I left after that.
Q Do you know anyone that works at the bus depot?
A Yes; I know Helen Moore.
Q And did she see you there that night?
A Well, I couldn't say because I didn't hold a conversation with her.
Q Did you buy anything?
A I bought coffee.
Q All right. What does Helen do?
A She works behind the stand where there is coffee served but she doesn't work in the coffee department; [96] she works where they sell food.

Q Does she have anything to do with the magazines at all?

A No, she doesn't.

Q Who was working at the magazine counter?

A She is a Caucasian girl, her name is Onida.

Q And have you seen her since that night?

A No, I haven't. But I think she still works there.

Q She in the courtroom today?

A No, she isn't.

Q What time did you leave the Greyhound Bus Depot?

A I am almost sure it was exactly 1:30 when I left that time.

Q How are you positive?

A Well, when I got downtown it was about twenty-five after 1:00 and it is about four or five minutes—was five after 1:30 when I got to the El Trocadero to eat breakfast and it is about a four or five minute walk.

Q How long did you stay at the El Trocadero?

A About—I would say ten 'til 2:00. I ate breakfast there.

Q Excuse me, I misunderstood you.

A I stayed 'til about ten 'til 2:00, 1:35 to ten 'til 2:00.

Q And you left?

A I left again.

Q Where did you go?

A I went back to the depot with an acquaintance of mine.

Q Who was that; a friend?

A His name is Sykes.

Q How do you spell that last name?

[97] A I think it is S-Y-K-E-S.

Q Sykes?

A Yes.

Q And how long were you with Sykes that night?

A I would say a good four—four hours. I was with him from about that time until about 7:00 in the morning.

Q Where?

A Well, we went back to the bus depot station. I met him there at the El Trocadero and we went back to the depot together and ordered more coffee and had a conversation about life and different things. And we left

about 4:00 o'clock and went back to the El Trocadero and stayed about 6:30 or 7:00.

Q How long have you known Sykes?

A I know him for a number of years. I say at least —at least four years.

Q Do you see him in the courtroom today?

A No, he isn't here.

Q Have you seen him since that night?

A Yes, I have.

Q And do you know where he lives?

A He stays on Weller. Weller and California, or, California and Weller.

Q You stated you are a singer, Mr. Grice. Are you a salaried singer? Do you work for someone?

A No.

Q Free lance or what?

A It has been pretty hard lately—I mean the major-
[98] ity of money I have been making is by my giving my own dances and so forth; and playing for different people, you know, like for parties and fraternities.

Q Did you work much in the month of December?

A No, I didn't, not at the Holland Club, but I did other engagements, you know, like—maybe in Hanford—you know, back and forth, just a lot running. But it wasn't steady at the Club.

Q Did you work much in January?

A Yes, I did. But, now I have to get myself clear. Did you say, "where" or "did you work"?

Q Did you work?

A Yes, I did.

Q And what was your income during the month of January?

A Well, early part of January it was about—I would say sixty some dollars.

Q For the month of January?

A Oh, not for the whole month. About $80, $85 in the whole month.

Q Do you have any other source of income other than what you earn?

A Yes, field laborer.

Q Field laborer?

A Yes.

Q Did you have any other source of income during the month of January other than field laborer and what you earned as a singer?

A Lot of odd and end jobs; working at car washes, I wash dishes, different things like that.

[99] Q Where were you on January 23rd, night before the robbery?

A The night before the robbery?

Q Yes.

A I don't know where I was.

Q Where were you the night after the robbery?

A What night would this be on, a Monday or a Tuesday?

Q 25th would be a Tuesday night.

A Well, I am not positive about that either.

Q Pardon me?

A I am not positive about that either.

Q Now, you stated you had heard through your sister that Detective Kelley telephoned her and said if you were involved in this robbery to give yourself up, is that correct?

A Yes.

Q And did you—did you make any effort at all to turn yourself in or—

A Well, my intentions were the following morning because I was singing that night—and my intentions was to go Monday morning.

Q When did you learn of this?

A It was early Sunday night about 8:30.

Q Where were you when you learned of it?

A At my mother's house.

Q Were you at the Elk's at all that night?

A Yes, I was.

Q And did you see any police officers at the Elk's?

A I didn't see them at the Elk's, but I did see them pass by.

[100] Q And what did you do at that time?

A I was leaving when I saw them. I was in a car when I saw them pass by.

Q And where did you go from there?

A I went to the Holland Club.

Q Didn't you suspect at this time that these police officers were looking for you?

A Yes, I did.

Q And isn't that what you told the detective when you were arrested?

A That is what I told him.

Q And wasn't that the reason for you leaving the Elk's Club to go to the Holland Club?

A No, that wasn't the reason. I was going to sing at 10:00 o'clock.

Q Wasn't it your real purpose to evade the police officers?

A No. I put it like this. I wasn't going to walk up there and say here I am. Because I had intentions to go Monday morning and I was supposed to sing that night. Why I didn't go to them, but I wasn't trying to dodge them or anything.

Q Did your sister tell you to turn yourself in if you were guilty and not to if you were innocent?

A No. She didnt' say anything about that.

Q Isn't that what you testified to? You were encouraged to through your sister by Detective Kelley that if you were guilty to turn yourself in?

A No. You misunderstood me. She told me she was [101] informed by Mr. Kelley and certain if I was guilty to turn myself in; if not still turn myself in to clear it up.

Q How well do you know Mr. Clay?

A I don't know him personally. I have saw him about twice.

Q Did you see him on the night of January 24th?

A No, I didn't.

Q Did you, in fact, see him at Foster's room?

A No, I didn't.

Q About midnight the night of the robbery?

A No.

Q Didn't you, in fact, go with Foster and Clay over to the Western Union?

A No, sir, I didn't.

MR. QUASCHNICK: People have no further questions.

REDIRECT EXAMINATION

BY MR. UCHIYAMA:

Q Mr. Grice, you were arrested January 30, 1966, is that right?

A Yes.

Q And from that time on to the present date where have you been staying?

A I have been in jail for the last three months.

Q And actually during this time who actually came to visit you—

MR. WELLS: Irrelevant, incompetent, and immaterial, your Honor.

MR. UCHIYAMA: Well, he was in jail.

THE COURT: Overruled.

MR. UCHIYAMA:

Q Isn't it true the only person that actually saw you [102] after you were arrested was your attorney, your father, your mother, isn't that correct?

A That's the only people.

Q You didn't see any of these that were named?

A They are not allowed to come up there.

Q You haven't seen any of them since January 30—

MR. WELLS: Your Honor, I ask the answer be stricken as far as they were not allowed to come up there.

THE COURT: Well, objection overruled.

MR. MADDY: I have no questions of this witness.

MR. QUASCHNICK: One other question:

Q Now, you were arrested January 30th, is that correct?

A I believe that was the date.

Q And where were you singing the night before?

A I was singing that same night that I was arrested.

Q Where were you the night before you were arrested?

MR. MADDY: Been asked and answered, your Honor.

MR. QUASCHNICK: Not on cross examination, counsel.

THE COURT: No, I do not believe it was.

MR. QUASCHNICK:

Q Would you answer, please?
A I am not positive where I was.
Q Were you out of town?
A No, I wasn't.
Q So then what you told Detective Biggers was not true, is that correct?
A Would you repeat that?
MR. QUASCHNICK: I have no further questions.
[103] THE COURT: I think that is argumentative.
All right, you may step down.
MR. UCHIYAMA: Defendant Grice rests.
THE COURT: All right. Any rebuttal?
MR. QUASCHNICK: No rebuttal, your Honor.
THE COURT: In view of the hour and since we cannot finish today we will recess until tomorrow morning at 9:30. The jury will keep in mind the admonition they are not to discuss this case with anyone nor amoung themselves nor to form any opinions concerning it until it is submitted for decision. Recessed until tomorrow morning at 9:30.
Counsel will remain.

(The jury was excused and cleared from the courtroom.)

THE COURT: All right, the record will show the jurors have left the premises.
Mr. Uchiyama?
MR. UCHIYAMA: Your Honor, on behalf of defendant Grice I think the law is clear that the testimony of accomplice must corroborate in order to be introduced. We had a motion reserved moving that the testimony be stricken on the basis there is no evidence produced corroborating it.
THE COURT: What you really want is a direct verdict of acquital?
MR. UCHIYAMA: Yes, your Honor.
THE COURT: I will grant you the corroboration isn't strong. Do you have any authority?

MR. UCHIYAMA: The only thing I have is the Penal [104] Code section and I haven't even checked this case, People versus Warren, 16 Cal. 2nd; 103.

This is out of this California Criminal Law Practice, your Honor, page 648, in regards to testimony of accomplices and instructions.

THE COURT: 643?

MR. UCHIYAMA: 648, your Honor.

THE COURT: 648; all right. Does the District Attorney's Office have anything?

MR. QUASCHNICK: Yes, your Honor. 98 Cal.App. 2nd; P 24 & 25; People versus Griffin.

THE COURT: All right. The Court will take the motion under submission and render a decision tomorrow morning.

(Court was adjourned until 9:30 AM May 10, 1966.)

[105] Morning Session May 10, 1966

THE COURT: Let the record show the defendants are here; that the jury is not here. Is there any change in circumstances, Mr. Maddy, regarding any possible reopening of the case?

MR. MADDY: Not at this time, no, your Honor.

THE COURT: All right. Both counsel have submitted their request for instructions and I have just quickly summarized what will be given.

MR. UCHIYAMA: Your Honor, we had a motion under submission.

THE COURT: Oh, yes. I have read all the authorities and the motion is denied. I think it would be a question of fact for the jury whether there is sufficient corroboration of the testimony of the accomplice.

Are there any questions about the instructions? If there are no questions we will bring the jury in.

Mr. Bailiff, will you bring the jury in.

(The jury was then seated in the jury box.)

THE COURT: All right, the record will show the jurors are all present.

This is the time for the argument of counsel. The People may make their opening argument.

MR. WELLS: Thank you, your Honor.

(Opening argument for the People was made by Mr. Wells.)

THE COURT: All right. Mr. Maddy?

MR. MADDY: Thank you, your Honor.

[106] (Argument for defendant Foster was made by Mr. Maddy.)

THE COURT: Mr. Uchiyama?

MR. UCHIYAMA: Yes, your Honor.

(Argument for defendant Grice was made by Mr. Uchiyama.)

THE COURT: Let's take a recess at this time. The jury will keep in mind they are not to discuss this case with anyone nor among themselves or to form any opinion thereon until it is submitted for decision. We will stand recessed for approximately fifteen minutes. You will be summoned by the bailiff.

Would counsel remain for a moment.

(The jury was escorted to the juryroom by the bailiff.)

THE COURT: Mr. Maddy, you made a reference to an instruction, and I am not criticizing you whatever for it, but it was one not requested and it is not one of our printed forms. Now, the only question is whether or not you are requesting it at this time. I will give it if you request it. That is your reference to the evidence offered as to the commission of another crime; and it is the instruction 33 in Caljic.

MR MADDY: Did I—

THE COURT: It was not requested by either counsel but you referred to it in your argument. So, I think if you want it I will give it.

Now, I will read the instruction which I think is the pertinent one, it would say:

Evidence was offered in this case for the purpose of showing that the defendant committed another [107] crime, which he is accused and for which he is on trial in this action, namely the armed robbery committed on the Western Union in Visalia.

Such evidence was received for a limited purpose only, not to prove distinct offenses or continued criminality, but for such bearing, if any, as it might have upon the question whether the defendant is innocent or guilty of the crime charged against him in this action.

You are not to consider the evidence for any other purpose and as to that purpose you must weigh such evidence as you do in all other questions. The value of any such evidence depends on whether or not it tends to show the identity of the person committing the alleged crime in question in this case; it was committed—

MR. MADDY: I would like to state for the record, your Honor, that I do not believe I objected to the evidence. I believe it does not meet the purpose. However, the Court has allowed it in and since the Court has allowed it in then I think the instruction should be given limiting the use of the evidence by the jury.

THE COURT: In the form I have read it? I do not think the other subsection applies.

MR. MADDY: I believe I would say this, your Honor, for the record; I believe the way Mr. Wells argued it and he presented the evidence, I think he was going along the modi operandi as well as identity.

[108] THE COURT: All right:

—that there existed in the mind of the defendant a plan or scheme or system or design which fitted the commission of the offense for which he is now on trial.

I think both the subsections would apply. I will give the instruction; I just wanted to call it to your attention.

MR. MADDY: Thank you, your Honor.

(A short recess was had.)

THE COURT: All right, the record will show the jurors are all present.

Mr. Quaschnick, you may make your argument.

MR. QUASCHNICK: Thank you, your Honor.

(Closing argument was made for the People by Mr. Quaschnick.)

THE COURT: Mr. Bailiff, close the doors, please.

(Following are the instructions given to the jury by the Court. Variations, if any, that cannot be copied by the Clerk are indicated by underscoring; comments or instructions not appearing in the Clerk's Minutes are enclosed in parentheses, ().)

THE COURT:

Ladies and Gentlemen of the Jury:

It becomes my duty as judge to instruct you concerning the law applicable to this case, and it is your duty as jurors to follow the law as I shall state it to you.

The function of the jury is to determine the issues of fact that are presented by the allegations in the information filed in this court and the defendant's plea of "not [109] guilty". This duty you should perform uninfluenced by pity for a defendant or by passion or prejudice against him. You must not suffer yourselves to be biased against a defendant because of the fact that he has been arrested for this offense, or because an information has been filed against him, or because he has been brought before the court to stand trial. None of these facts is evidence of his guilt, and you are not permitted to infer or to speculate from any or all of them that he is more likely to be guilty than innocent.

Therefore, in determining the guilt or innocence of the defendant you are to be governed solely by the evidence introduced in this trial and the law as stated to you by the Court. For such purpose the law forbids you to be governed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Both the People and the defendant have a right to demand, and they do demand and expect, that you will conscientiously

and dispassionately consider and weight the evidence and apply the law of the case, and that you will reach a just verdict regardless of what the consequences of such verdict may be. Such verdict must express the individual opinion of each juror.

-oOo-

You are the exclusive judges of the facts and of the effect and value of the evidence, but you must determine the facts from the evidence produced here in court. If any evidence was admitted and afterwards was ordered striken out, you must disregard entirely the matter thus stricken, and if any counsel intimated by any of his questions that certain hinted facts were or were not true, [110] you must disregard any such intimation, and must not draw any inference from it. As to any statement made by counsel in your presence concerning the facts in the case, you must not regard such a statement as evidence; provided, however, that if counsel for all parties have stipulated to any fact, you are to regard that fact as being conclusively proved; and if, in the trial, either party has admitted a fact to be true, such admission may be considered by you as evidence in the case.

-oOo-

If in these instructions any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you. For that reason, you are not to single out any certain sentence, or any individual point or instruction, and ignore the others, but you are to consider all the instructions as a whole, and are to regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

-oOo-

At times throughout the trial the court has been called upon to pass on the question whether or not certain offered evidence might properly be admitted. You are not

to be concerned with the reasons for such rulings and are not to draw any inferences from them. Whether offered evidence is admissible is purely a question of law. In admitting evidence to which an objection is made, the court does not determine what weight should be given such evidence; nor does it pass on the credibility of the [111] witness. As to any offer of evidence that has been rejected by the court, you, of course, must not consider the same; as to any question to which an objection was sustained, you must not conjecture as to what the answer might have been or as to the reason for the objection.

-oOo-

The court is endeavoring to give you instructions embodying all rules of law that may become necessary in guiding you to a just and lawful verdict. The applicability of some of these instructions will depend upon the conclusions you reach as to what the facts are. As to any such instruction, the fact that it has been given must not be taken as indicating an opinion of the court that the instruction will be necessary or as to what the facts are. If an instruction applies only to a state of facts which you find does not exist, you will disregard the instruction.

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In arriving at a verdict in this case, you shall not discuss or consider the subject of penalty or punishment, as that is a matter which lies with the court and other governmental agencies, and must not in any way affect your decision as to the innocence or guilt of a defendant.

-oOo-

A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal. This presumption places [112] upon the State the burden of proving him guilty

beyond a reasonable doubt. Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that of the case which, after the entire comparison and consideration of all the evidence. leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

The law does not require demonstration of that degree of proof which, excluding all possibility of error, produces absolute certainty, for such degree of proof is rarely possible. Moral certainty only is required, which is that degree of proof which produces conviction in an unprejudiced mind.

-oOo-

Neither the prosecution nor the defense is required to call as witnesses all persons who are shown to have been present at any of the events involved in the evidence, or who may appear to have some knowledge of the matters in question in this trial; nor is the prosecution or defense required to produce as exhibits all objects or documents that have been referred to in the testimony, or the existence of which may have been suggested by the evidence.

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Evidence, if any, that a defendant, on one or more occasions other than from the witness stand, made false, or contradictory statements concerning the charge against him which now is being tried may be considered by the [113] jury as a circumstance tending to prove a consciousness of guilt, but is not sufficient of itself to prove guilt. The weight to be given to such a circumstance, and the significance, if any, to be attached to it, are matters for the jury to determine.

-oOo-

When one who was not at the place where a crime was committed at the time of its commission is later accused

with having been present and having committed or taken part in committing such crime, his physical absence from the scene of the crime or his lack of participation therein, if proved, is a complete defense that we call an alibi.

The defendant in this case has introduced evidence tending to show that he did not participate in and was not present at the time and place of the commission of the alleged offense for which he is here on trial. If, after a consideration of all the evidence in this case, you have a reasonable doubt that the defendant was present at the time the crime was committed and that he participated in the alleged crime, he is entitled to an acquittal.

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It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus the decision as to whether he should testify is left to the defendant, acting with the advice and assistance of his attorney. You must not draw any inference of guilt from the fact that he does not testify, nor should this fact be [114] discussed by you or enter into your deliberations in any way.

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Every person who testifies under oath is a witness. You are the sole and exclusive judges of the credibility of the witnesses who have testified in this case.

In judging the credibility of witnesses, you shall have in mind the law that a witness is presumed to speak the truth. A Witness, however, may be impeached and this presumption overcome by contradictory evidence; by the manner of the witness on the stand; the degree of intelligence exhibited by him; the character of his testimony; by evidence showing his motive or interest in the outcome of the case or his bias or prejudice for or against one of the parties; by evidence that on some former occasion he made a statement or statements inconsistent with his present testimony; by evidence adversely affecting the character of the witness for truth, honesty, or integrity; or by proof that he has been convicted of a felony. You

will note that I do not say that any of the matters I have mentioned do overcome the presumption that the witness is speaking the truth; I only say that they may overcome that presumption. It is for you to decide whether they do or do not.

The impeachment of a witness does not necessarily mean that his testimony is completely deprived of value, or that its value is destroyed in any degree. The effect, if any, of the impeachment upon the credibility of the witness is for you to determine.

A witness wilfully false in one material part of his [115] testimony is to be distrusted in others. You may reject the whole testimony of a witness who wilfully has testified falsely as to a material point, unless, from all the evidence, you shall believe the probability of truth favors his testimony in other particulars.

However, discrepancies in a witness's testimony or between his testimony and that of others, if there were any, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience; and innocent misrecollection is not uncommon. It is a fact, also, that two persons witnessing an incident or a transaction often will see or hear it differently. Whether a discrepance pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance.

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You are not bound to decide in conformity with the testimony of a number of witnesses which does not produce conviction in your mind, as against the declarations of a lesser number or a presumption or other evidence which appeals to your mind with more convincing force. This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudece, or from a desire to favor one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not in

the relative number of witnesses but in the relative convincing force of the evidence.

-oOo-

[116] Where an attempt is made to impeach the defendant as a witness by showing that on some former occasion he made a statement or statements contradictory to his testimony here, such evidence may be considered not only for the purpose of testing his credibility as a witness, but also along with all other evidence in determining his guilt or innocence.

-oOo-

All persons concerned in the commission of a crime who either directly and actively commit the act constituting the offense or who knowingly and with criminal intent aid and abet in its commission or, whether present or not, who advise and encourage its commission, are regarded by the law as principals in the crime thus committed and are equally guilty thereof.

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For one person to aid and abet another in the commission of a criminal offense means to knowingly and with criminal intent aid, promote, encourage or instigate by act or counsel, or by both act and counsel, the commission of such offense.

-oOo-

In this case, you must decide separately the question of the innocence or guilt of the two defendants. (And must consider all evidence as it bears upon each defendant.) If you cannot agree upon the innocence or guilt of both the defendants, but do agree as to the innocence or guilt of one of them, you must render a verdict as to the one upon whose innocence or guilt you do agree.

-oOo-

[117] It is charged in the information that at the time of the commission of the offense therein described, the

defendant, or defendants, were armed with a deadly weapon, to wit: a gun.

If you find one or both of the defendants guilty of the crime thus charged, it will then become your duty to determine whether or not the defendant or defendants were armed with a deadly weapon at the time of the commission of the offense as alleged in the information and you will include findings on that question in your verdict, using a form that will be supplied for that purpose.

The term "deadly weapon", as used in the instruction just given, includes any instrument or weapon of the kind commonly known as a pistol, revolver, or firearm.

A person is "armed with" a weapon when he carries such weapon as a means of offense or defense.

-oOo-

If you find that the crime of robbery was committed and that any one of the persons who committed it was armed with a dangerous or deadly weapon, the robbery would be of the first degree.

-oOo-

Robbery is the felonious taking of personal property of any value in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.

Robbery which is perpetrated by torture or by a person [118] or by two or more persons any one of them being armed with a dangerous or deadly weapon is robbery in the first degree. All other kinds of robbery are of the second degree.

If you should find the defendant guilty of robbery, it will by your duty to determine the degree thereof and to state that degree in your verdict.

To constitute a robbery as being one of first degree because the person committing it is armed with a dangerous or deadly weapon, it is not necessary that such weapon be used.

-oOo-

In a crime such as that of which the defendants are charged in the information, there must exist a union or joint operation of act or conduct and a certain specific intent.

In the crime of armed robbery there must exist in the mind of the perpetrator the specific intent to deprive the owner of his property, and unless such intent so exists that crime is not committed.

-oOo-

A conviction may not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense.

An accomplice is one who is liable to prosecution for the identical offense charged against the defendant on trial.

To render a person an accomplice, he in some manner knowingly and with criminal intent must have aided and [119] abetted or advised and encouraged the commission of the criminal act charged.

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If the crime of robbery, the commission of which is alleged in the information, was committed by anyone, then, under the evidence in this case and as a matter of law, the witness J. B. Clay was an accomplice, and the rule requiring corroboration applies to his testimony.

-oOo-

Corroborative evidence is additional evidence to the same point and although it need not be sufficient standing alone to support a conviction, it must relate to some act or fact which is an element of the offense with which the defendant is charged. It must, in and of itself and independent of the evidence which it supports, fairly and logically tend to connect the defendant with the commission of the alleged offense. Corroborative evidence may

consist of other evidence or circumstances, the testimony of the witness other than an accomplice, or the testimony or admissions, if any, of the defendant.

In determining whether an accomplice has been corroborated you first assume the testimony of the accomplice to be removed from the case. You must then determine whether there is any remaining evidence which tends to connect the defendant with the commission of the offense. If there is none you must acquit the defendant. If there is such evidence then his testimony is corroborated. But before you may convict the defendant you must find from all the evidence that it carries the con-
[120] vincing force required by law.

-oOo-

It is the law that the testimony of an accomplice ought to be viewed with distrust. This does not mean that you may arbitrarily disregard such testimony, but you should give to it the weight to which you find it to be entitled after examining it with care and caution and in the light of all the evidence in the case.

In giving this instruction I do not intend to imply any opinion of my own as to the credibility of any witness.

-oOo-

(Evidence was offered in this case for the purpose of showing that the defendant Foster committed another crime than the one of which he is accused and for which he is on trial in this action, namely, the armed robbery committed on the Western Union office in Visalia.

Such evidence was received for a limited purpose only; not to prove distinct offenses or continual criminality, but for such bearing, if an, as it might have on the question whether the defendant is innocent or guilty of the crime charged against him in this action.

You must not consider it as evidence for any other purpose, and as to that purpose you must weight such evidence as you do all other in the case.

The value, if any, of such evidence depends on whether or not it tends to show: First, the identity of the person [121] who committed the alleged crime in question in this case, if it was committed; And other, that there existed in the mind of the defendant a plan, scheme, system or design, into which fitted the commission of the offense for which he is not on trial.)

-oOo-

Upon retiring to the jury room you will select one of your fellow jurors to act as foreman, who will preside over your deliberations and who will sign the verdict to which you agree. In order to return a verdict it is necessary that all twelve of the jurors agree to the decision. As soon as all of you have agreed upon a verdict, you shall have it signed and dated by your foreman and then return with it to this room.

-oOo-

(Forms of verdict will be provided you from which you will make your selection, which read as follows:)

We, the jury in the above entitled action, find the defendant, Walter Foster, guilty of violation of section 211 (a) of the Penal Code, armed robbery, as charged in the information filed in Proceedings No. 21561, and we fix the degree thereof as robbery of the BLANK degree, and find that the defendant, Walter Foster, BLANK armed with a deadly weapon.

(You will fill in the BLANKS.)

-oOo-

(Or;)

We, the jury in the above entitled action, find the defendant, Walter Foster, not guilty of violation of Section [122] 211 (a) of the Penal Code, armed robbery, as charged in the information filed in proceedings No. 21561.

-oOo-

(And with reference to the codefendant:)

We, the jury in the above entitled action, find the defendant, John Henry Grice guilty of violation of section 211 (a) of the Penal Code, armed robbery, as charged in the information filed in proceedings No. 21561, and we fix the degree thereof as robbery of the BLANK degree, and find that the defendant, John Henry Grice, BLANK armed with a deadly weapon.

-oOo-

(And:)

We find the defendant John Henry Grice not guilty of violation of section 211 (a) of the Penal Code, armed robbery, as charged in the information filed in proceedings No. 21561.

-oOo-

(Will you swear the bailiff.)

(Hereinafter, parenthetical remarks are those of the reporter. The Bailiff was sworn with the charge of the JURY.)

THE COURT: Now, this is near the noonhour, however, it would be extremely inconvenient to send you to lunch immediately as most places are probably very crowded at this time.

If you have not reached a verdict, and I am not suggesting in any manner whatsoever what the length of your deliberations should be, the Court will at the appropriate time direct you to be taken to a restaurant for lunch.

[123] Would counsel have any, or, would counsel accept the stipulation that if the jury has not reached a verdict by some convenient time for lunch that the Court may send them directly to the restaurant without bringing them back into the courtroom?

MR. WELLS: So stipulated, your Honor.

MR. MADDY: Stipulated.

MR. UCHIYAMA: Yes, your Honor.

THE COURT: And, incidentally, I am going to be tied up in a judge's meeting this noon so I will be down in the cafeteria.

MR. MADDY: When do you anticipate you will send them?

THE COURT: Oh, not until 12:45. It is so crowded in the restaurant prior to that time.

MR. MADDY: All right.

(The jury left the courtroom for deliberations; 11:50. 2:25; the jury returned to the courtroom.)

THE COURT: The record will show that the jury has returned to the courtroom at their request. What is it that the jury wishes to ask the Court?

THE FOREMAN: We gave the bailiff a list.

THE COURT: All right. You ask for Clay's testimony regarding Foster's jacket.

THE FOREMAN: That is right.

THE COURT: And David's identification at the two lineups.

THE FOREMAN: That is right.

THE COURT: Now, you also asked for closing argument?

THE FOREMAN: That was requested.

[124] THE COURT: I cannot properly do that; argument is simply argument. If the argument raised any question in your mind about the evidence I will have the evidence read; but, I cannot have the argument read.

Will you find Mr. Clay's testimony regarding Foster's jacket, Mr. Reporter?

I believe it was asked by the District Attorney.

(The above requested sections of the record was read to the jury.)

THE FOREMAN: We would like to hear how the man was dressed when he came in.

THE COURT: I would suggest it would take sometime to page through the testimony—

THE FOREMAN: In my mind I am trying to find out whether the jacket was underneath the coveralls or on top.

THE COURT: Well, I will have the reporter find that section. As I recall the testimony it was that the coveralls were over the jacket.

THE FOREMAN: Yes.

THE COURT: We will call you in then later and have it read to you. All right, you may return to the juryroom.

(Jury returned to the juryroom for further deliberations; 2:40. 2:50; the jury returns to the courtroom.)

THE COURT: All right, the record will show the jury has been brought back and the court reporter has now found the passages requested. Will you read them, Mr. Reporter.

(The record was read as requested above.)

[125] THE COURT: Is that the testimony?

THE FOREMAN: Yes. We also wish to have the cross examination of Mr. David including his identification at the lineup.

(The above requested testimony was read to the jury.)

THE COURT: Is that all of the testimony?

THE FOREMAN: Yes.

THE COURT: All right, if that is all you may return to deliberate further.

(The jury returned to the juryroom for further deliberations; 2:58, 4:10; the jury returns to the courtroom.)

THE COURT: The record will show the jury is present in the courtroom. First, I wish to state this is a rather awkward way for communicating with the jury but it is the only way that the law provides so I have to bring you all in here.

What I want to inquire about is whether or not you feel there is any prospects for reaching a verdict as to either or both of the—

THE FOREMAN: We have a verdict on one, your Honor.

THE COURT: All right. And you feel there is a possibility of your reaching a verdict on the other.

THE FOREMAN: I cannot say at this time.

THE COURT: You wish to further deliberate?

THE FOREMAN: We have been tied up with the same vote.

THE COURT: No change?

THE FOREMAN: No.

THE COURT: Let me ask you: How many jurors [126] still feel there is a prospect of reaching a verdict? Will you hold up your hands? You think there is a chance of your reaching a verdict? All right. Then I will ask you return and deliberate.

Are there any personal messages that need to be conveyed by any juror to any person depending upon your presence at home? Those messages will be conveyed by the bailiff if you will write them out.

All right. If at any time you feel, and all of you are agreed, there is no prospect of your reaching a verdict, will you also communicate that back to the Court if it comes to the fact?

JUROR: Well, your Honor, I do not think we have a prospect of coming to a conclusion. That is what I asked of you at the time, that I did—

THE COURT: Well, you go back and talk it over and decide that. In other words, if you feel, and that is the feeling of all of you, or you have reached a conclusion you cannot reach a verdict communicate that fact, also, by signifying. But at this time if you will return and deliberate.

(The jury returns to the juryroom for further deliberation; 4:13. 4:35; the jury returned to the courtroom.)

THE COURT: All right, the record will show the jurors are all present.

Ladies and gentlemen of the jury, have you reached a verdict as to both defendants?

MR. FOREMAN: We have, your Honor.

[127] THE COURT: All right, will you hand the verdict to the bailiff. All right, will you read the two verdicts, Mr. Clerk.

THE CLERK: In the Superior Court of the State of California in and for the County of Fresno; The People of the State of California, Plaintiff, versus Walter Foster, Defendant. We the jury in the above entitled action find the defendant, Walter Foster, guilty of violation of section 211 (a) of the Penal Code, armed robbery, as charged in the information filed in proceedings No. 21561, and we fix the degree thereof as robbery of the first degree, and find that the defendant, Walter Foster, was armed with a deadly weapon. Signed: Keyes M. Daniel, Foreman. Dated: May 10, 1966.

And:

The People of the State of California versus John Henry Grice. We the jury in the above entitled action find the defendant John Henry Grice not guilty of violation of section 211(a) of the penal code, armed robbery, as charged in the information filed in proceedings no. 21561. Signed: Keyes M. Daniel, Foreman. Dated: May 10, 1966.

THE COURT: All right, ladies and gentlemen of the jury, is this your verdict?

(Twelve affirmative indications.)

THE COURT: All right, does either counsel or anyone wish the jury polled?

MR. MADDY: Ask that the jury be polled in regards to Foster.

THE COURT: All right. The jury will be polled as [128] to whether or not the verdict as to Foster represents the verdict of each individual juror.

Will you poll the jury, Mr. Clerk.

(Thereupon the Clerk polled the jury and twelve answers were given to the question: Is the verdict as read your individual verdict?)

THE COURT: All right, twelve have answered in the affirmative. The defendant Mr. Grice will be released.

The probation hearing upon the verdict of the jury will be heard on May 27th at 9:00 o'clock. And the defendant Foster will be remanded to the custody of the Sheriff pending such probation hearing.

The jury will be excused at this time.

(Court stood adjourned.)

—oOo—

[129]

[Triple Certificate Omitted in Printing]

CERTIFICATION OF NONPUBLICATION

This opinion does not require publication in the advance sheets or official reports under the standards provided by Rule 976, California Rules of Court.

/s/ Stone
Acting P.J.

/s/ Gargano
J.

IN THE COURT OF APPEAL
FIFTH APPELLATE DISTRICT
STATE OF CALIFORNIA

5 Crim. No. 283

Filed, Court of Appeal, Fifth Appellate District,
April 25, 1967, James G. Huggins, Clerk,
By James G. Huggins

THE PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFF and RESPONDENT

v.

WALTER FOSTER, DEFENDANT and APPELLANT

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Harold V. Thompson, Judge. Affirmed.

Kenneth L. Maddy, under appointment by the Court of Appeal, for Defendant and Appellant.

Thomas C. Lynch, Attorney General, Daniel J. Kremer and Philip R. Birney, Deputy Attorneys General, for Plaintiff and Respondent.

By an information, appellant was charged with robbery first degree and with two prior convictions of felony. He admitted the priors and was found guilty of robbery first degree by a jury.

About 12:35 a.m. January 26, 1966, appellant and one Clay entered the Western Union Telegraph Company office in Fresno. Joseph David, the only employee on duty, observed Clay write a message on the back of a money order blank and show it to appellant, who apparently indicated approval. Appellant then took the paper, walked up to David and said, "Do what it say." David was able to read the first part of the message, "This is a holdup," but he could not make out the next two or three words. The concluding sentence, "Go and open the case," was plainly written. David looked up, and appellant said "You better do what it say." Clay and appellant each held a

revolver or small gun in his right hand. Clay instructed David to open the safe, which he did, whereupon appellant said, "Give me the large." David handed him about $500. Appellant grabbed the money and immediately left the Western Union office, followed shortly by Clay.

David testified that Clay was dressed in ordinary street clothing, while appellant wore a hat with the brim turned down, coveralls open down the front, and a black leather jacket beneath.

Clay, who was arrested the same day, confessed, giving complete details of the crime, implicating appellant and one Grice. As a result, appellant was arrested and taken to the police station.

Two or three days after the robbery, David viewed three men in a lineup at the police station, one of them being appellant. He could not positively identify appellant but said he thought he was one of the holdup men. A week or ten days after the robbery David viewed five men in a lineup at the county jail, and selected appellant as one of the robbers. David also identified appellant at the time of trial.

Appellant's principal contention is that requiring him to stand in a police lineup violated his constitutional rights. He first contends that it violated his Fifth Amendment right against self-incrimination. We note, at the outset, that during the trial no objection was made to any of the testimony concerning the lineup, the manner in which it was conducted, identification of appellant, or confrontation either at the police station or at the time of trial.

We are satisfied that no constitutional right of appellant was violated by requiring him to stand in a lineup for identification. Recent United States Supreme Court and California Supreme Court decisions make this clear. In *Schmerber* v. *California*, 384 U.S. 757 [86 S.Ct. 1826, 16 L.Ed.2d 908], the United States Supreme Court declared that the privilege provided by the Fifth Amendment "offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particu-

lar gesture." (P. 1832. See also *Gilbert* v. *United States*, 366 F.2d 923, 936-937; *People* v. *Ellis*, 65 A.C. 571, and cases cited therein.)

Appellant argues that requiring him to speak for voice identification constituted a separate and additional violation of his Fifth Amendment rights. This question is specifically dealt with in *Gilbert* v. *United States*, *supra*, and in *People* v. *Ellis*, *supra*. The court concluded, in Gilbert:

> "Because one's voice is as much a physical characteristic as the color of his eyes, we reject the notion, advanced by some authorities, that requiring the suspect to speak, where doing so does not involve communicating what he knows, violates his privilege."

Still a third aspect of appellant's Fifth Amendment argument is that he was denied the right to counsel before being required to stand in a lineup.

It is apparent from the cases cited above that since requiring a defendant to stand in a police lineup or to speak for voice identification falls within the category of real or physical evidence, and not within the Fifth Amendment constitutional proscription against self-incrimination, a defendant has no right to counsel or to be advised that he has the right to counsel before being required to stand in a lineup or to speak for voice identification. *People* v. *Juarez*, 243 A.C.A. 625, 629-630, holds, in substance, that failure to advise a defendant of his right to counsel, or the absence of his counsel at the time he is required to speak for purpose of voice identification, does not require the exclusion of the testimonial identification resulting therefrom. (See also *People* v. *Lopez*, 60 Cal.2d 223, 243.)

A word should be said about two cases cited by appellant in which a federal court reversed the convictions because in each instance the defendant's constitutional rights were violated in the process of obtaining voice identification. One case, *Wade* v. *United States*, 358 F.2d 557, was taken over by the United States Supreme Court on a writ of certiorari, so we are not free to consider it. The other case, *Palmer* v. *Peyton*, 359 F.2d 199, concerned

a negro serving consecutive sentences of life for the rape of a white woman in Virginia and of 40 years for a $5 robbery. It is distinguishable from our case on its facts. In *Palmer*, the first trial resulted in a mistrial, a second trial resulted in a hung jury. The convictions were obtained at a third trial, jury waived. The federal court ordered a new trial for Palmer, not because he was required to submit to voice identification, but because of the manner in which the voice identification procedure was conducted. The victim knew her assailant was a negro, about her height, that he wore an orange-colored shirt, and that he spoke in a high, child-like voice. She was taken to the police station and told that the police had a negro suspect in custody; she was shown an orange-colored shirt which had been removed from the defendant prior to her arrival; she was placed in one room, the sheriff and the defendant in an adjoining room, with the door ajar. The sheriff had the defendant repeat certain phrases which the victim stated had been used by her assailant, from which she identified him. The reviewing court pointed out that there was no lineup, that another suspect who was under arrest was not subjected to voice identification, nor were the voices of other persons provided for comparison. Moreover there was no confrontation or personal identification; the witness did not attempt to identify the defendant at any of the three trials. The federal court concluded that the highly suggestive atmosphere surrounding the voice identification could not have failed to affect the judgment of the witness. Thus, the conviction in the state court was set aside by the federal court, not because of self-incrimination under the Fifth Amendment or that the defendant was deprived of right of counsel, but, as the court put it, at page 202:

> "In their understandable zeal to secure an identification, the police simply destroyed the possibility of an objective, impartial judgment by the prosecutrix as to whether Palmer's voice was in fact that of the man who had attacked her. Such a procedure fails to meet 'those canons of decency and fairness' established as part of the fundamental law of the land."

We do not find such a denial of due process here. Two or three days after the robbery, Mr. David viewed three men in a lineup at the police station, the two men were shorter than appellant, and dressed differently, and one had a mustache. In the second lineup there were five men including appellant, all dressed in jail fatigue clothing, no conversation was had, and David positively identified appellant as one of the robbers. Applicable to appellant's contention is the following language found in *People* v. *Parham*, 60 Cal.2d 378, at page 380:

> "The manner in which the lineup was conducted affects only the weight of the witnesses' testimony, not its admissibility. The witnesses were thoroughly cross-examined concerning the lineup. It was the jury's function to consider the circumstances of the lineup in weighing the witnesses' testimony. The jury's implied finding that identity was established is supported by the evidence."

Testimony was admitted in evidence concerning appellant's participation in an armed robbery of the Western Union Telegraph Company's office at Visalia, California, on July 4, 1960. The defendant had been convicted of this robbery, it was charged as a prior conviction of a felony, and he admitted it. Therefore he asserts it was error to permit Mary Middleton, the clerk for Western Union who was on duty in the Visalia robbery, to testify as to the manner in which appellant committed the crime. Her testimony describing the robbery of the Visalia Western Union Telegraph office related a crime in which appellant participated, that was committed in a manner very similar to the robbery for which appellant was on trial. It is well established that when a defendant's conduct in connection with a prior crime bears similarity to his conduct in connection with the crime charged, and indicates that the conduct was directed by design in each case, evidence concerning such conduct is relevant and admissible. (*People* v. *Peete*, 28 Cal.2d 306, 314-318; *People* v. *Lopez*, *supra*, 60 Cal.2d at 249-250.) Evidence of the Visalia robbery was clearly admissible since the same kind of business was robbed, a written note was

given to the clerk, the robber was armed; in short, the *modus operandi* was identical. (*People* v. *Kelley*, 66 A.C. 225, 233.)

There is no merit to appellant's contention that he was limited in the cross-examination of the witness Clay, who turned state's evidence. The record discloses 10 pages of cross-examination, to which only one objection was made by the People, and that was overruled. The record is devoid of any request for further examination of Clay on either direct or redirect-examination.

The answer to appellant's contention that his home was subject to an illegal search is likewise without support. If appellant's home was searched, this fact does not appear in the record, and no objection was raised in the trial court to the introduction of evidence upon the ground of illegal search and seizure.

The judgment is affirmed.

/s/ Stone
Acting P.J.

I CONCUR:

/s/ Gargano
J.

Copies of the Opinion mailed on 4-25-67 to:

Reporter of Decisions, 4178 State Bldg., San Francisco, Calif. 2

Hon. Harold V. Thompson, Judge, Court House Bldg., Fresno, Ca. 1

Kenneth L. Maddy, 616 First Western Bank Bldg., Fresno, Ca.

Thomas C. Lynch, Atty. Gen. 500 Capitol Mall, Sacramento, Ca. 1

Order Due
June 23, 1967.

ORDER DENYING HEARING

AFTER JUDGMENT BY THE COURT OF APPEAL
5th District, Division, Crim. No. 283

Filed, Court of Appeal, Fifth Appellate District,
June 26, 1967, James G. Huggins, Clerk,
By E. B. Pliske, Deputy.

Filed, June 21, 1967, William I. Sullivan, Clerk,
By ....., S. F. Deputy.

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
IN BANK

PEOPLE

v.

FOSTER

Appellant's petitions for hearing DENIED.

TRAYNOR
Chief Justice

SUPREME COURT OF THE UNITED STATES

No. 688 Misc., October Term, 1967

WALTER B. FOSTER, PETITIONER

v.

CALIFORNIA

On petition for writ of Certiorari to the Court of Appeal of the State of California, Fifth Appellate District.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—March 25, 1968

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to the question of whether the conduct of the police lineup resulted in a violation of the petitioner's constitutional rights. The case is transferred to the appellate docket as No. 1257 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 315129 71

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FILED
AUG 23 1968
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 47

WALTER B. FOSTER,

Petitioner,

—vs.—

CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA,
FIFTH APPELLATE DISTRICT

BRIEF FOR THE PETITIONER

KENNETH L. MADDY
616 First Western Bank Building
1221 Van Ness Avenue
Fresno, California 93721

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 47

WALTER B. FOSTER,

Petitioner,

—vs.—

CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIFTH APPELLATE DISTRICT

BRIEF FOR THE PETITIONER

Opinion Below

The opinion of the Court of Appeal, Fifth Appellate District, State of California (A. 120-125), was certified for non-publication. (A. 119)

Jurisdiction

The judgment of the Court of Appeal, Fifth Appellate District, State of California, was filed April 25, 1967. Hearing was denied by the Supreme Court of the State of Cali-

fornia on June 21, 1967. On June 26, 1967 the District Court of Appeal, Fifth Appellate District, State of California, filed Remittitur to Fresno County, California, Clerk. Motion to Recall the Remittitur, Vacate Judgment and Reinstate Appeal, was filed June 27, 1967 in the District Court of Appeal, Fifth Appellate District, State of California and denied on June 28, 1967. Petition was filed in the Supreme Court of the State of California on July 28, 1967 for hearing on denial of Motion to Recall Remittitur, Vacate Judgment and Reinstate Appeal. On July 31, 1967 the Supreme Court, State of California granted additional time for hearing of said petition to Recall Remittitur, Vacate Judgment and Reinstate Appeal to and including September 26, 1967. On September 22, 1967 the Supreme Court of the State of California denied hearing on petition on denial of Motion to Recall Remittitur, Vacate Judgment and Reinstate Appeal.

Petition for Writ of Certiorari and motion to proceed *in forma pauperis* was filed September 8, 1967 in this Court and granted March 25, 1968, limited to the question of whether the conduct of the police lineup resulted in a violation of the petitioner's constitutional rights.

The jurisdiction of this Court rests on Title 28 U.S.C., Section 1257 (3).

Questions Presented

1) Whether the conduct of the police lineups resulted in such unfairness to petitioner, Walter Foster, that his rights to due process of law were infringed.

2) Whether specific actions of the prosecution in forcing petitioner to confront and converse with the victim of a

robbery in a private place in the presence of the police and District Attorney's Office and without counsel violated petitioner's rights under the Fifth Amendment to the United States Constitution.

Statement of the Case

Petitioner, Walter Foster, along with John Henry Grice, was charged in an information filed on the 17th day of March, 1966, by the District Attorney, in and for the County of Fresno, State of California, with violation of Section 211a, of the Penal Code, State of California, Armed Robbery. It was alleged Foster and Grice, on January 25, 1966, while armed with a gun, robbed Joseph E. David. (A. 5) Foster was also charged with two prior felony convictions. (A. 5)

On the 21st day of March, 1966 Foster appeared in Court and counsel was appointed to represent him. Arraignment was held and a plea of not guilty was entered by Foster. He admitted the prior convictions. Jury trial was set for May 9, 1966. (A. 6)

Trial was held on the 9th and 10th days of May, 1966 (A. 7-12), and on May 10, 1966 the jury returned its verdict of guilty of robbery in the first degree as to Foster; co-defendant Grice was found not guilty. (A. 11)

Report of the probation officer, judgment and sentence were scheduled for May 27, 1966. On May 24, 1966, Foster appeared in Court with counsel; the probation report having been received and considered by the Court, probation was denied and Foster was sentenced to State Prison for the term prescribed by law. (A. 16-18)

A timely notice of appeal was filed (A. 19), the record was subsequently filed in the Court of Appeal, Fifth Appellate District, State of California, and counsel on appeal was appointed. (A. 1)

The principal point raised on appeal concerned events surrounding two lineups conducted by the police at a time prior to Foster's arraignment and appointment of counsel, but after his arrest. The judgment of conviction was affirmed by the Court of Appeal, Fifth Appellate District, State of California on April 25, 1967. Subsequent appellate procedures were followed and exhausted by Foster in the California courts without relief being granted. (A. 1)

Factual Background

On January 24, 1966, John B. Clay got off work at 4:00 P.M. and traveled to the section of West Fresno, California referred to as Chinatown. (A. 45 and 46) Clay met Walter Foster there and they discussed girls and drank some wine purchased by Clay, and after some time the two men went to the rooming house where Foster and John Henry Grice lived. (A. 46 and 58) They continued to drink wine until approximately 11:30 P.M., when John Henry Grice arrived at Foster's room. (A. 47 and 58) Clay was then asked to drive Grice and Foster downtown and was advised that he would be paid $50.00 for his efforts. (A. 59 and 68)

When Clay and Foster met earlier that day Foster was wearing a black leather jacket, dark trousers and a shirt. (A. 59) Clay testified at trial Foster changed his clothes prior to going downtown, putting on coveralls, zipped all the way up and a hat. (A. 48 and 59) Whether Foster took off his leather jacket could not be recalled by Clay. (A. 59)

The trio drove to the Western Union Office in downtown Fresno where Foster and Clay, each armed, entered the office. (A. 49) Upon entering, Clay wrote a note and handed it to Joseph David, the late night manager of Western Union and the only person on duty at that time. The note stated, among other things, "This is a holdup." (A. 26) The time was 11:41 P.M. (A. 26)

Mr. David was ordered to the safe and withdrew the money box containing cash and coin. Foster took only the cash amounting to a sum in excess of $500.00 and left the building. (A. 27, 32, 52) Clay then made a threatening gesture and attempted to strike Mr. David, whereupon he also left the building. (A. 30, 36 and 62)

David testified Foster wore a turned down hat and a frock or coveralls at the time of the robbery, stating the coveralls were opened and a black leather jacket was seen underneath. (A. 30) He stated Clay wore casual clothes —a hat and suit coat. (A. 35) Clay testified that he wore a green sweater, light hat and blue jeans on that night. (A. 56)

The men were in the Western Union Office for a total of from nine (9) to eleven (11) minutes (A. 34), with Clay remaining three (3) to four (4) minutes longer than Foster. (A. 30) Mr. David did not give close attention to the men for approximately three (3) minutes while he cut a tape. (A. 26) Thereafter, and while they held guns on him he testified he got a close look at the men in the well lit room. (A. 27) However, at trial Mr. David changed his description of Foster somewhat, because, as he explained, the background when looking out of the Western Union Office on the night of the robbery was dark. (A. 42)

The three (3) men returned to Foster and Grice's rooming house where Clay left them off and thereupon returned to his home. (A. 53) The next day Clay met Foster at the Hollands Country Club and asked him for the $50.00 that had been promised; Foster refused. (A. 54) Later that evening Clay was arrested and implicated Foster and Grice in the robbery of the Western Union Office. (A. 72)

Mr. David was called to the police station two (2) or three (3) days after the robbery to view a lineup. (A. 33 and 39) There were three (3) men present in the lineup. (A. 40) One, identified later as Walter Foster, was close to six feet (6′) in height, hatless, and wearing a leather coat, similar to the one seen by David under the coveralls of one of the men who robbed him. (A. 40) The other two men were described as short men, five feet, five inches (5′ 5″) to five feet, six inches (5′ 6″) in height, both wearing hats and one with a mustache. Mr. David refused to make a positive statement in regard to identifying any of the persons who robbed him. (A. 33 and 40)

After viewing the lineup and refusing to make an identification, David asked to speak to Foster. (A. 39, 41 and 42) Mr. Kiehl of the Fresno Police Department and a gentleman from the District Attorney's Office brought Foster to an office where witness David sat across from Foster and conversed with him in the presence of the two men representing the prosecution. (A. 39, 41 and 42) David still would not identify Foster as one of the men who robbed him. (A. 40)

A week or ten (10) days later David was called to view a second lineup. (A. 33) Five (5) men, all dressed in jail dungarees, were in the lineup including Walter Foster.

Foster was the only individual present in the second lineup viewed by David who was present in the first lineup. (A. 41) David identified Foster at that time as one of the men who robbed him. (A. 34)

Summary of Argument

Petitioner, Walter Foster, was compelled to participate in two (2) lineups for the purpose of facilitating his identification by the victim of a robbery which occurred in Fresno, California on January 24, 1967. The first lineup was composed of three (3) men, including Foster. There was a disparity in size and dress between the other two (2) men and Foster. Further, Foster was wearing a jacket described by the victim as being similar to one worn by one of the men who robbed him.

At the conclusion of the lineup and upon refusal of the victim to make identification, Foster was compelled to speak and converse with the victim in a private place in the sole presence of representatives of the prosecution and without counsel.

Ten (10) days to two (2) weeks later a second lineup was held composed of five (5) men, including Foster. Walter Foster was the only man present in the second lineup who was in the first lineup. Only at this time did the victim of a robbery identify Foster as one of the men who robbed him.

The actions of members of the prosecution in the composition, events and circumstances of the two lineups were unfair and prejudicial to the rights of petitioner to due process of law.

The compelled personal confrontation between the victim of the robbery and Foster, where Foster was required to speak and converse with said victim violated Foster's privilege against self-incrimination as described in the Fifth Amendment to the United States Constitution.

ARGUMENT

I.

The Conduct of, and Procedures Followed, by the Police and Prosecution in Two (2) Lineups and in a Personal Confrontation With the Victim of a Robbery and Petitioner, Were Highly Suggestive and Conducive to Mistaken Identification and Violated the Rights of Petitioner, Walter Foster, to Due Process of Law.

> " • • • the confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial."
>
> *United States* vs. *Wade,* 388 U.S. 218 at 228, 18 L ed 2d 1149, 87 S.Ct. 1926 (1967).

Based on this premise the Court in the two (2) "lineup" decisions of *Wade* and *Gilbert* vs. *California,* 388 U.S. 263, 18 L ed 2d 1178, 87 S.Ct. 1951 (1967) set forth exclusionary rules to deter law enforcement authorities from exhibiting an accused to witnesses before trial for identification purposes without notice to and in the absence of counsel. Petitioner, Walter Foster, acknowledges the

non-retroactive effect of these decisions but makes claim that the evils recognized, stated, and condemned by the Court in *Wade* and *Gilbert* concerning police practices and procedure in the conduct of lineups were repugnantly present and manifest during the critical stages of the prosecution against him for a crime of which he was convicted and now serves time in prison.

During the robbery of the Western Union Office in the early morning hours of January 24, 1967, Joseph E. David was the lone employee on duty and the only apparent witness to the crime. He reported to the police and undoubtedly gave descriptions of the two (2) men he faced. Both were Negro, and the taller of the men, later stated to be Foster, wore a "frock" or "coveralls" with a black leather jacket in view underneath. (A. 24, 27 and 30)

The total time the men were in the Western Union Office was short and David observed the man alleged to be Foster from three (3) to six (6) minutes. (A. 26, 30 and 34) The man uttered four (4) statements for a total of approximately eighteen (18) words to David. (A. 26, 27 and 28)

On the evening of January 25, 1967, John B. Clay was arrested and, after questioning, implicated Foster and another individual in the crime. (A. 72) Foster was arrested and two (2) or three (3) days after the robbery David was asked to view a lineup. There were three (3) men in the lineup, two (2) considerably shorter than the third. (A. 33 and 40) The tall man wore a black leather jacket similar to the one seen by David under the frock or coveralls worn by one of the men who robbed him. (A. 40 and 42) Hats were worn by the short men, none by the tall man. One of the short men had a mustache. (A. 40)

The results of the lineup and the events that immediately followed the lineup were testified to by David on cross-examination at time of Foster's trial as follows:

"Q. Now about this lineup that you testified that you were at; the first lineup you could not identify Mr. Foster, is that correct?

A. I refused to—to make a positive statement.

Q. All right. Did you see Mr. Foster immediately after that lineup?

A. I asked if I could see—speak to him.

Q. And they brought him to the office—

A. And—

Q. —and who was in the office?

A. Mr. Kiehl and a gentleman from the District Attorney's Office, I forget his name, a younger man.

Q. And you had some conversation with Mr. Foster at that time, is that correct?

A. Yes. We sat across from each other.

Q. And you still did not identify him at that time, is that correct?

A. Yes—I didn't say.

Q. You were not sure at that time?

A. Pardon me?

Q. You were not sure at that time?

A. I—truthfully—I was not sure." (A. 39 and 40)

Because he did not make a positive identification of Foster, a week or ten (10) days later David was asked to view a second lineup at the Fresno County Jail. There were five (5) men in the second lineup all wearing jail dungarees. (A. 41) Foster was the only man present in the second lineup who was in the first lineup. (A. 41)

Testimony was elicited at trial by the prosecution from witness David concerning the identification of Foster at the lineups. (A. 33) The fact the jury considered the lineups is clear. (A. 115 and 116)

We contend the procedures used by the prosecution were so unnecessarily suggestive and conducive to irreparable mistake in identification that they violated Foster's right to due process of law. Further, the unfair and prejudicial lineups tainted the in-court identification of Foster and all such evidence was inadmissible. *Stovall* vs. *Denno*, 388 U.S. 293, 18 L ed 2d 1199, 87 S.Ct. 1967 (1967).

The *Stovall* case clearly indicated that despite the non-retroactive effect of *Wade* and *Gilbert*, in recognizing the right to counsel during the lineup, circumstances and events surrounding an identification procedure can be so unduly prejudicial as to fatally taint a conviction.

> *Simmons* vs. *U. S.*, — U.S. —, 19 L ed 2d 1247 (1968).

The facts and events of the lineups must be reviewed, for it was stated, "a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it." *Stovall* vs. *Denno*, 388 U.S. at 302. This is a recognition that matters can go too far. What is accepted procedure and practice by police and prosecution in the handling of accused persons can be abused to the extent convictions based on evidence obtained by extreme measures are not acceptable. The court's concern and the Due Process Clause are explained by Justice Frankfurter in *Rochin* vs. *People of California*, 342 U.S. 165, at 169, 96 L ed 183, 72 S.Ct. 205 (1952):

> "However, this Court too has its responsibility. Regard for the requirements of the Due Process Clause 'in-

escapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings (resulting in a conviction) in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.' Malinski vs. People of State of New York, supra, 324 U.S. at pages 416-417, 65 S.Ct. at page 789. These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental', Snyder vs. Commonwealth of Massachusetts, 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed. 674, or are 'implicit in the concept of ordered liberty'. Palko vs. State of Connecticut, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288."

Palmer vs. *Peyton*, 359 F.2d 199 (C.A. 4th Cir. 1966) applied this rationale to an identification procedure whereby the police, through suggestive and unfair measures, so prejudiced the entire atmosphere surrounding an identification that it was held a violation of due process.

In *Palmer* the victim of a rape described her assailant as a Negro with a high pitched voice and approximately her height. She further stated he wore an orange colored sport shirt at the time of the attack and that his head was covered with a clothespin bag. The identification process involved the victim listening to the voice of a lone suspect. She was not allowed to see the suspect she was asked to identify, although she had been told by the police that a suspect was

in custody; that he was Negro; and, she had been shown an orange colored shirt taken from the suspect. The victim was not asked to listen to any other voices other than that of the suspect.

An identification was made and the subsequent conviction of Palmer was based on said identification. The district court reversed, and noted,

> "In their understandable zeal to secure an identification, the police simply destroyed the possibility of an objective, impartial judgment by the prosecutrix as to whether Palmer's voice was in fact that of the man who had attacked her. Such a procedure fails to meet 'those canons of decency and fairness' established as part of the fundamental law of the land. A state may not rely in a criminal prosecution upon evidence secured by pumping a man's stomach, by breaking into his home, or by employing subtle psychological methods on him; nor may it rely on an identification secured by a process in which the search for truth is made secondary to the quest for a conviction."
>
> *Palmer* vs. *Peyton*, 359 F.2d 199 at 202 (C.A. 4th Cir. 1966).

The court in *Palmer* laid emphasis on certain actions by the police which when considered alone may be insignificant but when viewed from the totality of the circumstances took from the victim any alternative but to "identify" Palmer as the rapist:

1) The victim was told a Negro suspect was in custody;

2) The suspect's shirt, orange in color, and similar to a shirt worn by her assailant, had been shown to the victim before she was asked to make an identification;

3) The victim was asked to cooperate in a voice identification procedure entirely different than a normal lineup which she previously had viewed;

4) The victim was allowed to hear only one voice for identification. *Stovall* vs. *Denno,* 388 U.S. at 302 acknowledges the dangers inherent in single-suspect confrontations for the purpose of identification, noting the practice has been widely condemned. (See also, *People* vs. *Ballott,* 20 N.Y. 2d 600, 233 NE 2d 103 (1967).) Similar considerations were present in *Biggers* vs. *Tennessee,* — U.S. —, 19 L ed 2d 1267 where Mr. Justice Douglas stated in dissent at page 1269,

> "Whatever may be said of lineups, showing a suspect singly to a victim is pregnant with prejudice. The message is clear: the police suspect *this* man. (Court's emphasis.) That carries a powerfully suggestive thought. Even in a lineup the ability to identify the criminal is severely limited by normal human fallibilities of memory and perception. When the subject is shown singly, havoc is more likely to be played with the best-intended recollections."

Single-suspect confrontations are not the sole source of examples of police practices to be condemned. Any procedure which isolates one individual from a group and suggests to the witness that the police suspect *this man* results in undue influence and is unfair to the accused. This court in *Wade* cited examples of potentially prejudicial practices among which the following were noted: "• • • that the other participants in a lineup were grossly dissimilar in appearance to the suspect, • • •"; "• • • that only the suspect was required to wear distinctive clothing

which the culprit allegedly wore * * * *" *United States* vs. *Wade,* 388 U.S. at 233.

The California Supreme Court in following *Stovall* vs. *Denno,* recently reversed a conviction because of the grossly unfair makeup of a lineup. *People* vs. *Caruso,* 68 A.C. 181 (1968). The court observed,

> "In reaching this determination, we do no more than recognize, as did the United States Supreme Court, that unfairly constituted lineups have in the past too often brought about the conviction of the innocent."
>
> *People* vs. *Caruso,* 68 A.C. at 186 (1968).

The dangers of identification events have long been recognized and written about by persons involved in and concerned with the problems of the reliability of eye witnesses' testimony and police procedure. The consistent objection and danger is "the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses," which eliminates the reliability and trustworthiness of the identification. *United States* vs. *Wade,* 388 U.S. at 228. (See, *Wall,* Eye Witness Identification in Criminal Cases; 4 *Wigmore,* Evidence section 1130 (3rd Ed. 1940) and *Comment,* Possible Procedural Safeguards Against Mistaken Identification by Eyewitnesses, 2 UCLA L. Rev. 552.)

Applying this criteria to the events surrounding the arrest of Walter Foster and the subsequently held lineups it is patently obvious witness, Joseph David, was convinced and induced to make his identification of Foster by the action of the police and prosecution authorities. The first lineup in its makeup was violative of the principles an-

nounced in *People* vs. *Caruso*, 68 A.C. 181 (1968) and similar to those practices condemned by *Wade*. There was disparity in size of the participants with Walter Foster the lone tall individual. He was without a hat while the other men wore hats. One individual had a mustache when there was no indication at any time that David identified his robbers as having a mustache. Foster was isolated and set apart by the process of standing him with others of dissimilar size and dress. He was marked for identification.

Crucially and analogous to the "orange shirt" in *Palmer* vs. *Peyton, supra,* Foster was wearing a black leather jacket in the first lineup similar to one observed by David as being worn by one of the men who robbed him. The record does not disclose that David ever gave a description of the men who robbed him to the police but experience dictates this is one of the primary requisites of the initial investigation. In any event, the black leather jacket weighed heavily on the mind of David and ultimately in the mind of the jury who convicted Foster. (A. 115 and 116) (See, *Wall,* Eye Witness Identification in Criminal Cases, page 55.)

With all the above, nothing remained to be done by David except make the obviously suggested identification of Foster. He refused, however, and requested to speak to Foster.

Fairness, restraint to avoid prejudice and proper procedure would demand the request be denied and further investigatory steps be taken. However, with that "understandable zeal" which characterizes police practices that oftentimes result in abuses and unfairness to an accused, the police allowed the confrontation with the witness. We state "understandable zeal" because from the point of view

of the authorities they were undoubtedly convinced they had their man. An alleged accomplice, J. B. Clay, had identified and implicated Foster. Foster was a two-time loser, one of said convictions as a result of an armed robbery of a Western Union Office in Visalia, California, five (5) years earlier. (A. 78 and 79) A conviction was apparently assured to the prosecution if David would merely "recognize" and identify Foster. It was also essential and critical to the police and the authorities that the identification be made because of California Penal Code, Section 1111 which requires an accomplice's testimony must be corroborated before admissible. J. B. Clay, the accomplice, was their only other witness. (A. 45-70) It is obvious at this point the prosecution's chief pre-occupation was with the problem of getting sufficient proof. *United States* vs. *Wade,* 388 U.S. at 235, 18 L ed 2d 1149, 87 S.Ct. 1926 (1967).

Foster was taken to a private room and David was allowed to speak and converse with him solely in the presence of the prosecution. This was in all respects a showup and manifested with the evils and dangers of the single-suspect confrontation. (*Wall,* Eye Witness Identification in Criminal Cases, pages 28 to 40.) A similar situation arose in *Crume* vs. *Beto,* 383 F.2d 36 (C.A. 5th Cir. 1967). The court there clearly indicated that if the police had initiated procedures which isolated the suspect and forced him to confront the witness a denial of due process would have existed. The distinguishing factor in *Crume* from this case and the point most heavily emphasized in *Crume,* was that the witness had "already settled firmly on Crume" as the accused. (*Crume* vs. *Beto,* at page 40.)

The Court pointed out,

"Once a faint glimmer of recognition strikes a witness, his tendency may be to do everything in his power to reinforce that recognition and come to a positive identification. To compensate, a fair practice might be to require the police to take every reasonable precaution to insure that the witness is not overly influenced by his original impression, and that he arrives at an objective and accurate identification. Thus even when the witness requests that the person he has tentatively identified be required to do or say something, all participants in the lineup should be required to act or speak. There is much to say for this practice. We think it is unquestionably fairer than singling out the tentative suspect. When the witness' original identification is tentative or is for some other reason suspect, such a procedure could easily rise to the dignity of a due process requirement."

Still David would not identify Foster. The final blow by the prosecution, however, was administered a week or ten (10) days later when David observed a second lineup. Foster appeared again with four (4) persons, *none of whom were in the first lineup.* What more could the prosecution do which would suggest to David their interest in having Foster identified? Their actions in effect told David that here is the man. One commentator views the procedure of a second lineup as follows:

"If the witness views a line-up and fails to make an identification, should he be permitted to view it a second time? Generally, he should not, unless the circumstances of the line-up are to be changed; for ex-

ample, unless glasses or hats are to be worn by the participants during the witness's second view. If the witness is asked to view the same line-up a second time, without such a justification, an impression may be created that the police are improperly attempting to secure an identification from a person unable to make one—an impression which may reflect upon their credibility should they happen to testify as to any other material fact in the case. Moreover, the witness himself, if asked to view the same line-up a second time, may infer that the police are confident that their suspect is the guilty party, and he may thus be influenced to make an identification which he would not otherwise make. And, of course, if the witness is asked to view a second and different line-up containing the same suspect he failed to pick out the first one, there is a great danger that he will 'recognize' the suspect, realize that he has seen him before and, acting upon this recognition, identify him."

Wall, supra, at 64.

Every step taken by the prosecution during the identification process was calculated to bring about one result—for Joseph David to identify Walter Foster. No one procedure escapes criticism; persuasion, unfairness, prejudice and suggestion ran rampant over the rights of petitioner. The authorities convinced Joseph E. David that Walter Foster robbed him.

The grossly unfair composition of the first lineup was inexcusable. The witness had but little opportunity to observe the men who robbed him. (A. 26, 30 and 34) He faced them while nervous and fearful of his life, and while observ-

ing guns pointed at him (A. 28), in a place he contradictorily described as "well-lit" (A. 27), however, subject to a "contributory factor" of a background of total darkness. (A. 42) He was unsure and subject to suggestion. There was no urgency or need for immediate action as in *Stovall* which required the single-suspect confrontation with the witness. And, finally, the second lineup from which the witness could only draw one conclusion: that this man he had seen in the previous lineup and with whom he was allowed to speak and converse must be the right man.

The suggestion and influence by the authorities in the identification process before trial tainted the in-court identification of petitioner and resulted in such unfairness that it infringed petitioner's right to due process of law. *Wong Sun* vs. *United States*, 371 U.S. 471, 96 L ed 2d 441, 83 S.Ct. 407 (1963); *Gilbert* vs. *California*, 388 U.S. 263, 18 L ed 2d 1178, 87 S.Ct. 1951 (1967). The conviction of Walter Foster should be reversed and remanded for a new trial unaffected by Joseph E. David's tainted identification.

II.

The Compelled Confrontation of Petitioner and a Prosecution Witness in a Private Place, and in the Sole Presence of the Prosecution Authorities, Where Petitioner Was Required to Speak and Converse With the Witness Violated Petitioner's Privilege Against Self-Incrimination.

Mindful of the majority decision in *United States* vs. *Wade*, 388 U.S. 218, 18 L ed 2d 1149, 87 S.Ct. 1926 (1967) petitioner, nevertheless, raises the issue of violation of his rights under the Fifth Amendment to the United States Constitution in regard to the compelled confrontation with the principal witness for the prosecution where petitioner was required to speak and converse with said witness in the presence of the police department and the prosecution and without counsel, all to facilitate his identification. The compulsion and requirement by the authorities for Foster to converse and speak to the witness violated his privilege against self-incrimination.

At the first lineup Foster was required to attend, the prosecution witness could not make identification of the man who robbed him despite the many suggestive factors attendant in the composition of the lineup. (A. 39, 40) The witness asked to speak to Foster and Foster was compelled to comply. It is clear he was forced at this point to assist the prosecution in convicting him by speaking and conversing with the witness, David.

The Court in *Miranda* vs. *Arizona*, 384 U.S. 436, at 460, 16 L ed 2d 694, 86 S.Ct. 1602 (1967) set forth the policy of the privilege against self-incrimination as follows:

"We have recently noted that the privilege against self-incrimination—the essential mainstay of our adversary system—is founded on a complex of values. (Citations) All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a 'fair state-individual balance,' to require the government 'to shoulder the entire load,' 8 Wigmore, Evidence 317 (McNaughton rev 1961), to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth. (Citation) In sum, the privilege is fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will.' Malloy vs. Hogan, 378 U.S. 1, 8, 12 L ed 2d 653, 659, 84 S.Ct. 1489 (1964)."

The right to remain silent should mean just that, and not to remain silent, except at a lineup or when you are asked to assist the prosecution in prompting a doubtful witness to make identification. Justice Black in dissent in *United States* vs. *Wade,* 388 U.S. at 245, indicated the requirement to speak in a lineup is a violation of the Fifth Amendment which requires a reversal and prohibition of the lineup identification at a subsequent trial. He stated:

"So here, having Wade in its custody awaiting trial to see if he could or would be convicted of crime, the Government forced him to stand in a lineup, wear

strips on his face, and speak certain words, in order to make it possible for government witnesses to identify him as a criminal. Had Wade been compelled to utter these or any other words in open court, it is plain that he would have been entitled to a new trial because of having been compelled to be a witness against himself. Being forced by the Government to help convict himself and to supply evidence against himself by talking outside the courtroom is equally violative of his constitutional right not to be compelled to be a witness against himself."

We contend any violational act which can directly connect an accused with a crime should be within the protection of the Fifth Amendment. Requiring an accused to speak and converse with a witness to aid and facilitate identification is such a violational act. This is a far cry and can be distinguished from merely exhibiting your person along with others for comparison in a properly constituted, objective lineup. (*Meintrauh,* Voice Identification, Writing Exemplars and the Privilege Against Self-Incrimination, 10 Vand. L. Rev. 485 (1957).)

We have raised this issue with the factual circumstances of the lineup procedures experienced by Foster primarily in mind. Also, in conjunction therewith, the protective measures and doctrine of the *Wade* and *Gilbert* cases are questioned. In short, we ask if an attorney had been present with Walter Foster at the time of the lineups and during the surrounding events thereto, would Foster be adequately protected in his constitutional rights as envisioned by the Court in these decisions? Can the mere presence of an attorney meet the danger, " • • • where so many variables

and pitfalls exist * * * ", and where, "the first line of defense must be the prevention of unfairness and the lessening of the hazards of eye witness identification at the lineup itself." *United States* vs. *Wade,* at 235.

We contend the answers supplied by *Wade* and *Gilbert* are inadequate; that these decisions constitute a recognition of the problem and some protection for an accused, but that a lineup or showup is such a potential source of unfairness and prejudice that greater safeguards of the rights of individuals is demanded.

Guidelines and standards must be set forth which will direct the authorities, courts and counsel in protecting the rights of the accused at a time so critical. (See *Comment,* Lawyers and Lineups, 77 Yale L. Rev. 390 (1967).) To recognize voice identification as within the privilege against self-incrimination the court will protect "one of our nation's most cherished principles—that the individual may not be compelled to incriminate himself" (*Miranda* vs. *Arizona,* 384 U.S. at 458), and provide the authority to correct some abuses of the lineup procedures.

Experience dictates that the court is correct in stating:

> "The trial which might determine the accused's fate may well not be that in the courtroom but that at a pretrial confrontation, with the State aligned against the accused, the witness the sole jury, and the accused unprotected against the overreaching, intentional or unintentional, and with little or no effective appeal from the judgment there rendered by the witness—'that's the man'."
>
> *United States* vs. *Wade,* 388 U.S. at 235, 236.

However, we disagree that "a meaningful confrontation at trial" is a sufficient safeguard and we ask how does "presence of counsel itself * * * often avert prejudice?"

United States vs. *Wade*, 388 U.S. at 236.

The problem of relying on cross-examination of witnesses and the defense establishing the parade of evils of an unfair lineup are noted in a recent California appellate decision:

> "But here it was not the prosecution which brought the condemned method of obtaining the identification into evidence: it was defendant herself. The prosecution is to be commended that it shunned taking advantage of the officers' improperly obtained evidence. We cannot say, however, that that completely cured the evil. The jury was concerned with the ultimate verity of identification. The circumstances here put defense counsel on the horns of a dilemma. Either he allowed the courtroom identification to go unchallenged or he himself was driven to put the inadmissible evidence before the jury to demonstrate its spurious nature.
>
> A defendant should not be thus tactically disadvantaged."

People vs. *Pedercine*, 256 A.C.A. 357 at 366 (1968).

Also, the defense is faced with placing great emphasis on the pre-trial lineups which will only strengthen the case in the minds of the jurors who tend to believe the prosecution witnesses, and oftentimes solidify the testimony of the witness. (*Wall*, Eye Witness Identification in Criminal Cases, at 19.)

To be able to prevent an unfair and prejudicial lineup, direction to your client is necessary, backed by knowledge of the authority of your position.

Discussion of the privilege against self-incrimination in the majority opinion of *Wade* relied on this Court's recent decision in *Schmerber* vs. *California,* 384 U.S. 757, 16 L ed 2d 908, 86 S.Ct. 1826, wherein the court said at 763, 764:

> "It is clear that the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers. Boyd vs. United States, 106 U.S. 616, 29 L ed 746, 6 S.Ct. 524. On the other hand, both federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling 'communications' or 'testimony', but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it."

As acknowledged by the court "this distinction is a helpful framework for analysis" (*Schmerber* vs. *California,* 384 U.S. at 764. However, it should not be compelling in every instance. Countervailing considerations should be weighed in the light of the value of the evidence that is sought. *Miranda* vs. *Arizona,* 384 U.S. at 461.

Throughout the decisions in *Wade, Schmerber* and *Miranda* the court was involved in weighing values, not the least of which is the reliability of the evidence ultimately obtained. Compare:

> "Extraction of blood samples for testing is a highly effective means of determining the degree to which a person is under the influence of alcohol."
>
> *Schmerber* vs. *California,* 384 U.S. 757, at 771, 16 L ed 2d 908, 86 S.Ct. 1826 (1967), with:
>
> "The vagaries of eyewitness identification are well known; the annals of criminal law are rife with instances of mistaken identification."
>
> *United States* vs. *Wade,* 388 U.S. at 228.
>
> "Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice."
>
> *Miranda* vs. *Arizona,* 384 U.S. at 458.

Lineups are most commonly used following crimes where the victims face the criminal for short periods of time under great stress and fear. Robberies and rapes predominate. *United States* vs. *Wade,* 388 U.S. at 230. The robber or rapist oftentimes has his face covered (*United States* vs. *D'Argento,* 373 Fed. 2d 307 (C.A. 7th Cir. 1967); *State* vs. *Ramirez,* 76 N.M. 72, 412 P.2d 246 (1966)) or speaks in a whisper. (*People* vs. *Ellis,* 65 Cal.2d 529 (1966).) To say that voice identification presents reliable evidence under the circumstances of the great majority of these type criminal cases is stretching a point beyond practicality. It is difficult to deny that the Supreme Court of California was correct when it stated in the recent case of *People* vs. *Ellis,* 65 Cal.2d 529 (1966), at 534:

> "The speech patterns of individuals are distinctive physical characteristics that serve to identify them just as do other physical characteristics such as color of eyes, hair, and skin, physical build and fingerprints."

However, to say even the most discerning witness to a robbery or a victim of a rape can make these distinctions following five (5) to ten (10) minutes of violence where a person speaks through a clothespin bag (*Palmer* vs. *Peyton,* 359 F.2d 199 (C.A. 4th Cir. 1966)) or a stocking or t-shirt mask (*State* vs. *Ramirez, supra; United States* vs. *D'Argento, supra*) or after listening to eighteen (18) spoken words by a nervous robber (A. 26, 27 and 28), is contrary to common sense. An objective voice identification could not be made under these circumstances. (See, Note, Constitutional Ramifications of the Police Lineup, 12 Vill. L. Rev. 135 (1966).)

As stated in *Wade,* 388 U.S. at 229,

> " • • • the dangers for the suspect are particularly grave when the witness' opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest."

The value and reliability of the so-called identification of voice is further diminished when used, as is often the case, in the single-suspect confrontation. (*Palmer* vs. *Peyton, supra; Stovall* vs. *Denno,* 388 U.S. 293, 18 L ed 2d 119, 87 S.Ct. 1967 (1967) and *State* vs. *Ramirez, supra.*) No objective means of comparison are given and the power of suggestion is strong. 4 *Wigmore,* Evidence Section 1130 (3rd Ed. 1940); *Frankfurter,* The Case of Sacco and Vanzetti, 32 (1927).

The value of the voice identification is minimal when weighed with the dangers implicit in the lineup procedure and the need for counsel to have the necessary means by which to safeguard the accused's constitutional rights. The right to remain silent at a lineup; to refuse to speak for voice identification should be protected by the privilege against self-incrimination. Petitioner Walter Foster's privilege against self-incrimination was violated by the prosecution's requirement that he speak and converse with Joseph E. David.

The admission into evidence of testimony concerning the illegal lineup requires the conviction of Foster be vacated and remanded for a new trial excluding the identification testimony of Joseph E. David. *Gilbert* vs. *California,* 388 U.S. at 273.

Conclusion

For the reasons hereinabove stated, the judgment of conviction of petitioner, Walter Foster, in the District Court of Appeal, Fifth Appellate District, California should be vacated, and the case remanded for further proceedings and a new trial excluding the identification testimony of prosecution witness, Joseph E. David.

Respectfully submitted,

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Walter Foster

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 47

WALTER B. FOSTER,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the Court of Appeal of California, Fifth Appellate District

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the Court of Appeal of the State of California, Fifth Appellate District, was certified for nonpublication; it is set forth in its entirety in the Appendix at pages 120–125. This opinion affirmed the judgment of the Superior Court of the State of California, in and for the County of Fresno finding appellant guilty of the crime of armed robbery. A

petition for hearing in the California Supreme Court was denied without opinion on September 21, 1967 (67 A.C. No. 7, Minutes p. 6).

JURISDICTION

Jurisdiction is conferred on this Court by Title 28, section 1257(3), United States Code.

The judgment of the California Court of Appeal, Fifth Appellate District was entered on April 25, 1967 (A.120-125). A timely petition for hearing in the California Supreme Court was filed on June 2, 1967, and denied on June 21, 1967 (A.126). The remittitur issued June 26, 1967 (A. 1). Petitioner's motion to recall the remittitur was denied by the California Court of Appeal, Fifth Appellate District, on June 28, 1967 (A.1). On July 31, 1967, the California Supreme Court extended its time for considering a petition for hearing; this petition was denied on September 21, 1967 (A.2).

A timely petition for writ of certiorari and motion to proceed in forma pauperis was filed with this Court on September 8, 1967 (A.2). A response was requested of respondent. After submission of the response, the petition for certiorari was granted on March 25, 1968, limited to the question of whether the conduct of the police lineup resulted in a violation of petitioner's constitutional rights (A.127).

QUESTIONS PRESENTED

1. Were the police lineups so unnecessarily suggestive and conducive to irreparable mistaken identifica-

tion as to constitute a denial of due process to petitioner?

2. Did the one-to-one confrontation with petitioner at the victim's request violate the petitioner's constitutional right to the privilege against self-incrimination?

3. Should a harmless error rule be applied to any alleged errors in the lineups or confrontation?

STATUTES INVOLVED

The Fifth, Sixth, and Fourteenth Amendments to the United States Constitution are set forth in Appendix A to this brief.

STATEMENT OF THE CASE

On March 17, 1966, the District Attorney of Fresno County filed in the Fresno Superior Court an information charging petitioner and one John Henry Grice with armed robbery in violation of California Penal Code section 211(a);[1] petitioner Walter B. Foster was also charged with two prior felony convictions: (1) assault with intent to commit rape; and (2) robbery (A.5).

On March 21, 1966, counsel was appointed to represent petitioner (A.6). Petitioner was arraigned, pleaded not guilty, and admitted the truth of the alleged prior felony convictions (A.6).

On May 9 and 10, 1966, petitioner, represented by counsel, was tried before a jury in the Fresno County Superior Court (A. 7,8,21-100). On May 10, 1966, the

[1] See Appendix B hereto.

jury returned its verdict of guilty of armed robbery, first degree, and found that petitioner was armed with a deadly weapon (A. 11,15,118).

Codefendant Grice was acquitted (A.118).

On May 24, 1966, the court denied probation to petitioner who was present in court with counsel and entered a judgment of conviction (A. 16,17). The court sentenced petitioner to the California State Prison for the term provided by law (A. 18).

A timely notice of appeal was filed (A. 19), and the judgment affirmed on appeal by the Court of Appeal of the State of California, Fifth Appellate District. The court's opinion was certified for non-publication (A. 119-125). A petition for hearing was denied by the California Supreme Court (A. 126).

The Robbery

At approximately 5:00 p.m. on January 24, 1966, petitioner and James Clay met by happenstance in the "Chinatown" section of Fresno, California (A.45,46). They had not met previously although Clay had seen petitioner before (A. 45,57). The two men discussed girls and shared Clay's "triple jack". Upon petitioner's assurance that he could get a girl for Clay, Clay drove the petitioner to the rooming house where petitioner lived (A.57). They arrived there at approximately 5:30 p.m. (A.46,47). The two men continued to talk and drink in petitioner's room; between 7:30 and 8:00 p.m., petitioner asked Clay if he would like to make $50.00 by driving petitioner to

the Western Union office. Clay agreed to do so (A.46,47,59).

Codefendant Grice arrived at petitioner's room at approximately 11:30 p.m. Petitioner and Grice had a conversation outside of Clay's presence (A.47). They returned to the room; petitioner changed his shoes, donned coveralls and a large brimmed hat and announced, "Let's go" (A.47,48). Clay knew, because of petitioner's offer of $50.00 to drive him to the Western Union office, that "something was going on wrong" but he did not realize what his role was to be (A. 68).

Clay followed the directions given to him by petitioner and drove to the Western Union office in Fresno (A. 49,60,67). Petitioner then told Clay that he was to accompany petitioner into the Western Union office and gave Clay a revolver (A.49,60,69). Clay was instructed by petitioner that once inside, he, Clay, was to write a note stating in effect that this is a holdup, open the safe and hurry up. The third man, codefendant Grice, remained in the car (A.50,60,70).

Petitioner and Clay entered the Western Union office at approximately 12:30 a.m. on January 25, 1966. Joseph E. David, the Western Union operator, was on duty alone when the two entered. Clay wrote a note on a Western Union money order blank and handed it to Mr. David. The note stated, "This is a hold-up . . . go and open the case" (A. 26,50,60, 69,70). At the time Clay handed the holdup note to the victim, petitioner had taken the pistol out of his

pocket and was pointing it at the victim (A. 26,27, 51,61). Clay also drew his gun (A. 51).

The Western Union office was well lighted and the victim, Mr. David, could see the robbers clearly (A.27). Mr. David was told to get the cash box and petitioner said to him, "Watch what you do" (A. 27). Mr. David got the cash box and brought it to the counter where it was opened and the money exposed to view. Petitioner said, "Give me the large" and he took the bills, approximately $500.00, and left the office (A.27,28,52). Clay, after a brief period followed petitioner out of the premises and joined petitioner and Grice in the waiting car. Inside the car, petitioner said, "See how easy that worked? All white folks think colored folks look the same. They never know who it was" (A.52).

The victim, Mr. David, testified that petitioner was wearing a hat with a turned-down brim, coveralls and a leather jacket under the coveralls (A.29,30). Clay testified [2] that petitioner was wearing coveralls and a large black hat, the brim of which came down over his face (A.48), and that he had been wearing a black leather jacket earlier which Clay did not see him take off before putting on the coveralls (A. 59). Petitioner spoke several phrases in the Western Union office while the robbery was in progress: "Do what it say" (A. 26); "You better do what it say" (A. 26,51); "Watch what you do" (A. 27); "Give me the large" (A. 28,36). He spoke in a soft voice (A. 37). These

[2] Clay pled guilty to a charge of armed robbery and testified for the prosecution at petitioner's trial (A.54,63,71).

directions spoken by petitioner were directed to the victim, Joseph E. David.

The trio then returned to petitioner's rooming house where petitioner and Grice got out of the car. Clay returned petitioner's gun and a later meeting was arranged for payment to Clay of the $50.00 previously agreed upon (A.53). At that meeting, during the afternoon of the 25th, petitioner declined to make payment saying he would do so when "the heat would cool down"(A.54,69). Clay subsequently turned himself in to the police and implicated petitioner and Grice (A.71,72).

The Lineups

Shortly (1–3 days) after the robbery, Mr. David was summoned to view a police lineup. He was given no additional information but merely asked to participate in the lineup proceeding (A. 41). Petitioner was on the righthand end of the three-man lineup; he was wearing a leather coat but no hat (A. 40). Mr. David described petitioner as being approximately six feet tall and the other two participants in the lineup as being approximately 5'5" or 5'6"; both of them, apparently, wore hats; one had a moustache (A. 39;40,41,42). David had not seen either of the two men before (A. 40). Mr. David tentatively identified petitioner at that time. He "thought it was" the man (A. 33).

Immediately following this first lineup, Mr. David requested to speak to petitioner and petitioner was brought to an office and viewed by the witness in the

presence of a representative of the police department and of the district attorney's office. Petitioner and the witness sat across from each other and, apparently, engaged in a conversation (A. 39). Mr. David did not make a positive identification of petitioner (A.40).

Approximately a week or ten days later a second lineup was held. Five persons, dressed in fatigues, participated in this lineup. Petitioner was the only person in the second lineup who had been in the first lineup (A. 41). Apparently, codefendant Grice was in this lineup but Mr. David did not identify him (A.44). Following the second lineup, David made a positive identification of petitioner (A.34).

He testified that he had an opportunity during the course of the holdup to see petitioner's face clearly (A.26,27); he also heard his voice during the course of the holdup.

Petitioner did not take the stand at trial or produce any witnesses in his own behalf. Codefendant John Henry Grice testified alleging an alibi for himself but he neither exonerated nor incriminated petitioner by his testimony (A. 87–99).

Petitioner admitted the two prior felony convictions (A. 6). The victim of the prior robbery, Mary Rose Middleton, a Western Union telegraph operator, testified concerning the circumstances of the robbery of the Western Union office at which she was employed on July 4, 1960, and identified petitioner as one of the two robbers (A. 78–80).

SUMMARY OF ARGUMENT

The procedures adopted by the police in the two lineups and the confrontation between the petitioner and the victim of the robbery were neither so suggestive nor conducive to false or mistaken identification of petitioner that petitioner was denied due process of law, particularly in a case where the petitioner was identified at trial by his accomplice who testified as to the details of the crime charged against petitioner.

A one-to-one confrontation for voice identification purposes could not constitute a violation of the privilege against self-incrimination inasmuch as no evidence was adduced of any statements made by petitioner at that time.

If there were any errors in the pre-*Wade* lineup procedures they did not constitute a deprivation of due process of law but would be harmless error under *Chapman* v. *California* (1967) 386 U.S. 18, 22, 17 L.Ed.2d 705, 87 S.Ct. 824.

ARGUMENT

I. The Police Lineups Were Not So Unnecessarily Suggestive and Conducive to Irreparable Mistaken Identification as to Constitute a Denial of Due Process to Petitioner.

In *United States* v. *Wade* (1967) 388 U.S. 218, 18 L.Ed.2d 1149, 87 S.Ct. 1926, the majority of this Court concluded that the post-indictment lineup was a critical stage of the prosecution at which a defendant was entitled to the aid of counsel as well as at trial.

See also *Gilbert* v. *California* (1967) 388 U.S. 263, 18 L.Ed.2d 1178, 87 S.Ct. 1951. In *Stovall* v. *Denno* (1967) 388 U.S. 293, 18 L.Ed.2d 1199, 87 S.Ct. 1967, the Court limited the effect of the *Wade* and *Gilbert* rules to those cases and all future cases which involved confrontations for identification purposes, conducted in the absence of counsel, to those confrontations arising after the date of the decisions, June 12, 1967. California has adopted similar rules.[8]

In *Stovall* v. *Denno, supra,* which involved a collateral attack on pretrial identification procedures, this Court set forth the test to be applied to cases tried prior to the decision in the *Wade* case, and stated:

> "We turn now to the question whether petitioner, although not entitled to the application of *Wade* and *Gilbert* to his case, is entitled to relief on his claim that in any event the confrontation conducted in this case was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law. This is a recognized ground of attack upon a conviction independent of any right to counsel claim. Palmer v. Peyton, 359 F.2d 199. . . . However, a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it. . . ." (388

[8] *People* v. *Feggans* (1967) 67 Cal.2d 444, 62 Cal.Rptr. 419, 432 P.2d 21; *People* v. *Harris* (1967) 67 Cal.2d 866, 64 Cal.Rptr. 313, 434 P.2d 609; *People* v. *Caruso* (1968) 68 A.C. 181, modified at 272, 65 Cal.Rptr. 336, 436 P.2d 336.

U.S. at pages 301–302 [18 L.Ed.2d 1206] footnote omitted.)[4]

That the question of unfairness depends upon the totality of circumstances presented by the case has been reaffirmed in *Simmons* v. *United States* (1968) 390 U.S. 377, 19 L.Ed.2d 1247, 88 S.Ct. 967, and *Biggers* v. *Tennessee* (1968) 390 U.S. 404, 19 L.Ed.2d 1267, 88 S.Ct. 979.

But before a defendant may invoke the exclusionary concept he must demonstrate that the lineup "resulted in such unfairness that it infringed his right to due process of law." *Stovall* v. *Denno, supra,* 388 U.S. 293, 299.

It is submitted that in the present case, petitioner has failed to support his contentions in this regard.

The record discloses that the police became aware of petitioner's participation in the robbery through the voluntary statements of his accomplice, Clay, sometime during the afternoon or evening of January 25, 1966. Clay knew petitioner and implicated him by name (A. 72). Within the next few days (1–3) the victim, Mr. David, was contacted by the police and asked to come to a lineup. The person who called "asked if it were convenient for me to come down. They wanted me to look at some men" (A. 41). No suggestion was made to Mr. David that the police had arrested the robbers (A. 41).

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[4] To the same effect see *People v. Caruso, supra,* 68 A.C. 181; *People* v. *Harris, supra,* 67 Cal.2d 866, 872; *People* v. *Feggans, supra,* 67 Cal.2d 444, 448-449; *People* v. *Romero* (1968) 263 A.C.A. 651, 654, 69 Cal.Rptr. 758; *People* v. *Smith* (1968) 259 A.C.A. 861, 866, 66 Cal.Rptr. 551; *People* v. *Irvin* (1968) 264 A.C.A. 881, 892-893, ___ Cal.Rptr. ___.

The first lineup consisted of three men including petitioner (A.33). Two of the men were shorter and smaller than petitioner;[5] petitioner was bareheaded and wore a leather jacket; the other two wore hats and one of them had a moustache (A.40). The record is silent as to whether the other two men were attired in jackets.

After viewing this lineup, Mr. David thought petitioner was the robber but did not make a positive identification (A.33, 39). He asked to be allowed to speak to petitioner and in compliance with this request, petitioner was brought to the office and viewed by the witness in the presence of a representative of the police department and the district attorney's office. Petitioner and the witness sat across from each other and apparently engaged in conversation. The record does not disclose the contents of the conversation, if any, or other details of this meeting. The victim, however, again did not make a positive identification of petitioner (A. 39,40).

The next lineup took place a week or ten days later and consisted of five persons including petitioner (A. 33,41) and codefendant Grice (A. 44). The lineup participants were all dressed in fatigue coveralls; none, except petitioner, had been in the first lineup (A.42). Mr. David, the victim, made a positive identifiction of petitioner at this time (A. 34).

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[5] Mr. David's testimony, the only evidence on the point, was that petitioner was close to six feet tall and the other two men were "maybe 5 feet 5 or 5 feet 6 something in there someplace." (A. 40.)

At trial Mr. David testified briefly on direct examination concerning the lineups and in detail on cross-examination as to both the lineups and the one-to-one confrontation (A. 33,34,39,40,41,42,44). He definitely identified petitioner as one of the robbers (A. 25).

Considering the totality of these circumstances, it appears that the procedures adopted by the police did not so violate the canons of decency nor offend the sensitivities that the principles of *Rochin* v. *California* (1952) 342 U.S. 165, 96 L.Ed. 183, 72 S.Ct. 205, should be applied. The conduct of the lineups did not result in a tainted, in-court identification.

In the present case it appears that there was a cautious victim who wished to be fairly certain of his identification and not to mistakenly identify the wrong person. He had ample opportunity to view the robbers during the course of the robbery since they were on the well-lighted Western Union office premises for approximately ten minutes (A. 26,27,34). See *People* v. *Ford* (1967) 89 Ill.App.2d 69, 233 N.E.2d 51; *State* v. *Sears* (1967) 182 Neb. 384, 155 N.W.2d 332.

The first lineup conducted shortly after the robbery consisted of three people. The police prior thereto in no way suggested that one of these individuals was the suspect, when the victim was asked to come to the station to view the individuals. See *Wise* v. *United States,* 383 F.2d 206 (D.C.C. 1967); *United States* v. *Quarles,* 387 F.2d 551 (4th Cir. 1967); *Caples* v. *United States,* 391 F.2d 1018 (5th Cir. 1968).

Immediately after this lineup, petitioner's presence was requested by the victim who had tentatively identified him in order that he could confront him since the robber had spoken several phrases during the course of the robbery (A. 26,27,28,36,37,51). This was done and a conversation had. No evidence of the conversation or statements made at that time were sought to be introduced in evidence. See *Hanks* v. *United States*, 388 F.2d 171 (10th Cir. 1968); *Crume* v. *Beto*, 383 F.2d 36 (5th Cir. 1967).

Petitioner was not masked at the time of the robbery but wore a distinctive dress, a coverall over his leather jacket and a hat with the brim turned down (A. 29,30). The victim gave approximately the same description of petitioner's clothing as did petitioner's accomplice who testified at the trial (A. 29,30,48,59).

At the trial both the victim and petitioner's accomplice identified petitioner as one of the robbers. His accomplice, who had previously pled guilty, testified completely as to the commission of the offense by the men. It was also established that petitioner had several years previously been one of those who had participated in the robbery of another Western Union office and its employee, and he was so identified by that employee at the trial (A. 78-82).

Under federal law no corroboration of accomplice testimony is required. *Moody* v. *United States*, 376 F.2d 525 (9th Cir. 1967), reversed on another ground; *Lockett* v. *United States*, 374 F.2d 883. It is required under California law, section 1111, Penal Code, and

was supplied by the testimony of Mr. David. *People* v. *Wade* (1959) 53 Cal.2d 322, 329, 349 P.2d 116, 1 Cal.Rptr. 683; *People* v. *Wayne* (1953) 41 Cal.2d 814, 822, 264 P.2d 547; *People* v. *Parker* (1965) 235 Cal.App.2d 86, 44 Cal.Rptr. 900. The in-court identification of petitioner by Mr. David as well as his description of the clothing worn by the robber fully corroborated the testimony of the accomplice as to the petitioner's connection with the offense.

Thus the circumstances presented in this case are far different than those before the courts in *Palmer* v. *Peyton*, supra, 359 F.2d 199; *People* v. *Ballott* (1967) 20 N.Y.S.2d 600, 233 N.E.2d 103; or *People* v. *Caruso, supra,* 68 A.C. 181, cited by petitioner in support of his contention that the lineups were so unfair as to deny petitioner a fair trial.

In *Palmer* v. *Peyton, supra,* the defendant at the time of the commission of the rape had been attired in an orange shirt with a paper bag over his head. The victim viewed a lineup the next day and made no identification of the defendant who had been arrested on a tale told by his neighbor. On the way to the station the following day, the victim was advised by the police that they had a Negro suspect and she was to listen to him for a possible voice identification. No lineup was held nor confrontation allowed at that time. The victim was placed in one room and the suspect in another. The victim was shown an orange shirt and the suspect was asked to speak. Based on the words spoken, the victim identified the suspect. She

[6] See Appendix B.

heard no other voices for comparison and the alleged rapist was given no opporunity to confront her. At trial she testified to her extra-judicial identification but did not make an in-court identification. The court held that the conduct engaged in by the police did not comport with the standards of decency and fairness required under the due process clause; that the opportunity for suggestion which was inherent in the procedure used to secure this identification was manifest.

Again in *People* v. *Ballott, supra,* 20 N.Y.S.2d 600, a Negro wearing a hat and heavy overcoat with the collar turned up robbed a company of its payroll. Two witnesses saw him but one did not see his face. One year later, the police showed the other witness the defendant, alone, in a station house. After he spoke the words used on the day of the robbery and put on a coat and hat, she identified him. She also identified him in court. The court held that absent "imperative" circumstances, the practice of having a witness view only one suspect could be so suggestive as to amount to a denial of due process.

In *People* v. *Caruso, supra,* 68 A.C. 181, the defendant was the driver of a "get-away" car in a robbery. The witnesses at the scene had scant opportunity to view him. He was picked up the same night and placed in a lineup the next morning with four others. He was 6 feet 1 inch, weighed 238 pounds, was of Italian descent with a dark complexion and dark wavy hair. The other four members of the lineup neither resembled him in size, complexion or hair.

Although the victims identified the defendant in the lineup and at trial, the court held that the lineup was unnecessarily suggestive and conducive to irreparable identification so as to deprive defendant of due process of law. However, in that case the defendant was only briefly seen at the time of the robbery, he produced evidence of an alibi, and his testimony showed no motive for the robbery.

In the present case as appears from the record, the victim had full opportunity to see and hear the robbers; the scene of the robbery was well lighted; petitioner's clothes were distinctive; he was not masked; he was fully identified by his accomplice whose trial testimony corroborated that of the victim and the totality of circumstances showed that the lineups were not unnecessarily suggestive or conducive to irreparable misidentification as to deprive him of due process of law. As is apparent, the pretrial lineups and confrontation did not affect the integrity of the fact-finding process and under the facts of the case created no clear danger of convicting the innocent.

II. The One-to-One Confrontation of Petitioner With the Victim at the Victim's Request After His Tentative Identification of Petitioner at the Lineup Did Not Violate Petitioner's Privilege Against Self-Incrimination.

Petitioner seeks to attack the one-to-one confrontation following the first lineup which was held at the victim's request as a violation of his privilege against self-incrimination under the Fifth Amendment.

Since the decision of this court in *Holt* v. *United States* (1910) 218 U.S. 245, 54 L.Ed. 1021, 31 S.Ct. 2,

where the accused was required, over his protests, to put on a blouse, the argument that such compelled activity violated the privilege against self-incrimination has been rejected. As stated by Mr. Justice Holmes in that case, at pages 252–253:

> "But the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof."

So through the years, in *Breithaupt* v. *Abram* (1957) 352 U.S. 432, 1 L.Ed.2d 448, 77 S.Ct. 408; *Schmerber* v. *California* (1966) 384 U.S. 757, 16 L.Ed.2d 908, 86 S.Ct. 1826, petitioner's contention has again been rejected. In *Schmerber* v. *California, supra,* at page 761, Mr. Justice Brennan, speaking for a majority of the Court, stated:

> ". . . We therefore must now decide whether the withdrawal of the blood and admission in evidence of the analysis involved in this case violated petitioner's privilege. We hold that the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to these ends."

In *United States* v. *Wade, supra,* 388 U.S. 218, the majority of this Court again rejected the contention

that a suspect who was compelled to appear in a lineup, wear strips of tape on his face and speak words allegedly used by the bank robber was subjected to a violation of his privilege against self-incrimination and stated, at pages 222-223:

> "We have no doubt that compelling the accused merely to exhibit his person for observation by a prosecution witness prior to trial involves no compulsion of the accused to give evidence having testimonial significance. It is compulsion of the accused to exhibit his physical characteristics, not compulsion to disclose any knowledge he might have. It is no different from compelling Schmerber to provide a blood sample or Holt to wear the blouse, and, as in those instances, is not within the cover of the privilege. Similarly, compelling Wade to speak within hearing distance of the witnesses, even to utter words purportedly uttered by the robber, was not compulsion to utter statements of a 'testimonial' nature; he was required to use his voice as an identifying physical characteristic, not to speak his guilt."

To the same effect, see *Gilbert* v. *California,* 388 U.S. 263, 266–267, 18 L.Ed.2d 1178, 87 S.Ct. 1951 (handwriting exemplars).

Here the purpose of the one-to-one confrontation requested by the victim was apparently to see and hear petitioner. It was not to elicit any statement of his guilt. It was solely for the purpose of identification, and certainly not an act of violence upon the person of petitioner.

The results of voice identification tests fall within the category of real or physical evidence. In such a test, the speaker is asked not to communicate ideas or knowledge of facts but to engage in a physiological process necessary to produce a series of articulated sounds, the verbal meanings of which are unimportant. The sounds alone are elicited for identification purposes through characteristics such as pitch, tone, intonation, accent or word stress. The speech patterns of individuals are distinctive physical characteristics that serve to identify them just as do other physical characteristics such as color of eyes, hair, skin, physical build and fingerprints. *People* v. *Ellis* (1966) 65 Cal.2d 529, 55 Cal.Rptr. 385, 421 P.2d 393; *Reeves* v. *State* (1968) 3 Md.App. 195, 238 A.2d 307.

Since voice identification is an objective type of factual evidence it does not rely on the veracity of the accused. There is no risk that one would be coerced into falsely accusing himself. *United States* v. *Quarles, supra,* 387 F.2d 551; *Hanks* v. *United States, supra,* 388 F.2d 171.

Petitioner seeks to justify the exclusion of this type of testimony on the ground that it requires a volitional act from the accused and that the state in its sense of fairness should be precluded from demanding assistance of any kind from an individual in penal proceedings against him. This theory attempts to classify certain aspects of a suspect's conduct which occur during the investigative stage or while undergoing identification tests as "active" and thereby barred by the privilege, and other aspects as "passive"

and hence allowable under the privilege. But cooperation by suspects with law enforcement personnel is not diminished in degree because it involves motionless conduct on the part of those investigated. An identification that is based on passively-manifested conduct, such as holding the head erect and still for a photograph or the fingers steady during fingerprinting is not significantly different from identifications that flow from more active or volitional responses such as turning around in a lineup or speaking as part of a voice identification test. There is not a clear enough distinction between the various physical responses to identification tests to warrant the suggested selective widening of the privilege.

Further, it should be remembered that in this case the victim made no separate and distinct voice identification of petitioner either before or at the trial. At best, the voice was only one of many impressions used by the victim to reconstruct the image of the whole robber. To the extent that the voice contributed to the overall identification, it was a reliable factor. Accomplishing voice alteration under the circumstances surrounding the robbery and the police station meeting would have been extremely difficult. The psychological pressures inherent in such occurrences would have made the concentration necessary to maintain a changed voice through either or both of the confrontations an impossible task for all but the most disciplined of individuals. Therefore, the similarity between the voice heard at the time of the crime and that heard during a voice identification test would be

reliable evidence of identification and also evidence that an alteration had not been attempted or adequately executed by the suspect at the time of the crime.

Nothing in the record suggests that the victim failed to obtain a sufficient sample of petitioner's voice at the time of the robbery. The two were in close proximity, the victim recalled the words used by petitioner and petitioner was not wearing a mask or anything over his mouth which might have muffled or changed the sound. The drama of the occasion heightened the victim's memory of the voices that confronted him the night of the robbery and gave him a valid basis with which to judge any later voice identification tests.

Although it may be assumed that petitioner was compelled to enter the room for the one-to-one confrontation, there is nothing in this record which discloses that he was compelled to engage in a "conversation" with the victim once he was inside the room. There is no showing that he was compelled to speak or perform voice tests while he was with the victim. The word "conversation" implies mutual participation and the unhindered and uncoerced exchange of comments. In fact by entering into and continuing the conversation, it would appear that petitioner would have effectively waived the contention that he was compelled against his will to incriminate himself.

It should also be noted that no objection was raised to any testimony as to this confrontation in the trial court. On the contrary, the details of this occurrence

were only brought out on cross-examination and no mention made thereof on direct examination. Since a violation of the privilege against self-incrimination as contained in the Fifth Amendment was applied to the states in *Malloy* v. *Hogan* (1964) 378 U.S. 1, 12 L.Ed.2d 653, 84 S.Ct. 1489, decided prior to the trial of this case, petitioner's failure to object on this ground at the time of trial and to move to strike any testimony of the witness was not excused,[7] nor was any objection raised on motion for new trial.

Thus it would appear that in the present case, the question of voice identification is not squarely presented but, even if it were, the language of the *Wade* case, *supra,* as well as previous cases decided on this point, are authority for the proposition that the privilege against self-incrimination does not apply to either the confrontation or the conversation which took place in this case.

III. Under the Facts and Circumstances of This Case if There Was Any Error in the Lineup Procedures A Harmless Error Rule Should Be Applied.

The basic purpose of the *Wade* and *Gilbert* cases is to deter law enforcement authorities from exhibiting an accused to witnesses before trial for identification purposes without notice to and in the absence of counsel to the end that the possibility of mistaken identification will be prevented or minimized. Thus in *United States* v. *Wade, supra,* 388 U.S. 218, at 228, the Court stated:

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[7] *Schmerber* v. *California, supra,* 384 U.S. at 765-6, fn. 9

"A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification. . . . Suggestion can be created intentionally or unintentionally in many subtle ways. And the dangers for the suspect are particularly grave when the witness' opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest. . .

"Moreover, '(i)t is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then before the trial.' "

The Court in the *Stovall* case looked to the "totality of the circumstances surrounding it" to determine whether the conduct of the confrontation violated due process of law. See also *Simmons* v. *United States, supra,* 390 U.S. 377; *Biggers* v. *Tennessee, supra,* 390 U.S. 404.

In *Gilbert* v. *California, supra,* 388 U.S. 263, the Court held that the admission of the in-court identifications following a lineup conducted without notice to and in the absence of the accused's counsel was a denial of the Sixth Amendment right to counsel and called into question the admissibility at trial of the in-court identifications by witnesses who attended the lineup. However, in the course of its opinion (388 U.S. at p. 272), the Court makes it clear that in any case

where such error occurred the prosecution has the opportunity to establish that the introduction of such evidence was harmless error.

Here the record shows: 1) that the first lineup was shortly after the offense—petitioner was tentatively identified by the victim; 2) no suggestion was made to the victim that the lineup contained one of the suspects; 3) the victim requested that the person he tentatively identified confront him; 4) the victim made no pretrial identification of another person; 5) at the time of the robbery, the victim had full opportunity to see and hear the petitioner and to observe his distinctive dress; 6) the victim's description of petitioner's clothing was corroborated by that of petitioner's accomplice; 7) petitioner's accomplice identified him at the trial and testified fully as to the robbery and petitioner's participation; 8) the victim identified petitioner at the trial; 9) petitioner was identified at trial as one of the persons who had committed a robbery of a Western Union office several years previous to this robbery.

The application of a harmless error rule to a case involving any alleged constitutional error in the conduct of pre-indictment lineups is entirely consistent with and closely related to the court's expression in the *Stovall* case that "a claimed violation of due process of law in the conduct of a confrontation depends on the totality of circumstances surrounding it." Certainly the circumstances of the lineups and confrontation in this case should not be considered as ones

which could not be cured by the application of a harmless error rule.

The reasons given by this Court for not giving *Wade* and *Gilbert, supra,* retroactive effect (namely, [1] the law enforcement officials of the federal government and of all 50 states had proceeded on the premise that the Constitution did not require the presence of counsel at pretrial confrontations for identification; [2] the Court's rulings were not foreshadowed by its cases; [3] the majority of American courts treated the question as one of credibility for the jury and not admissibility; [4] law enforcement officials had relied on this weight of authority in conducting pretrial examinations in the absence of counsel; and [5] the retroactive application of the *Wade* and *Gilbert* cases would seriously disrupt the administration of the criminal law) certainly would tend to support the ruling that petitioner was not subjected to a deprivation of his constitutional rights by the procedures adopted in a pre-*Wade* case.

Under California law, counsel for the defense prior to trial has full opportunity for discovery, including copies of police reports. *People* v. *Riser* (1957) 47 Cal.2d 566, 305 P.2d 1; *People* v. *Estrada* (1960) 54 Cal.2d 713, 7 Cal.Rptr. 897, 355 P.2d 641; *Ballard* v. *Superior Court* (1966) 64 Cal.2d 157, 49 Cal.Rptr. 302, 410 P.2d 828. Thus counsel for the defense prior to this trial would have had an opportunity to obtain these documents and ascertain any statements made by the witnesses as to descriptions or lineups. At trial counsel for petitioner had full opportunity to cross-

examine the victim as to the identification procedures adopted. This was relevant evidence and properly brought before the jury. *People* v. *Diaz* (1967) 66 Cal.2d 801, 58 Cal.Rptr. 729, 427 P.2d 505; *People* v. *Parham* (1963) 60 Cal.2d 378, 33 Cal. Rptr. 497, 384 P.2d 1001.

In this case no objection was raised at trial or on motion for new trial as to evidence regarding the lineups or confrontation. In fact, the evidence as to the confrontation was first developed by defense counsel upon his cross-examination of the victim. Though counsel may not have been required to possess the prescience to anticipate the *Wade* and *Gilbert* decisions by one year, nevertheless an objection based upon the provisions of the Fourteenth Amendment could have been raised.

Again, as to any alleged violation of the provision against self-incrimination, the case of *Malloy* v. *Hogan, supra,* 378 U.S. 1, was decided some two years prior to the trial of this case. Hence any objection based upon the privilege against self-incrimination should have been raised by motion to strike the victim's testimony and an objection made on this ground or on motion for new trial. Thus, it would appear that the questions now sought to be raised were not properly preserved in the trial court.

To further support the contention of the respondent that any error in the lineups even if considered of

constitutional magnitude should not require a reversal of state court judgments in pre-*Wade* and *Gilbert* cases reference should be made to the recent statute passed by Congress, P.L. 90-351 on June 19, 1968, where in Section 2002 thereof it is provided:

> "The testimony of a witness that he saw the accused commit or participate in the commission of any crime for which the accused is being tried shall be admissible in evidence in a criminal prosecution in any trial court ordained and established under Article III of the Constitution of the United States."

This Court should not require a stricter standard for state courts than Congress has now delimited for federal courts and prosecutions.

No alleged error in the lineups should be held to taint the proceeding against petitioner nor warrant the setting aside of his conviction where, as here, the accomplice fully testified in open court as to the identity of petitioner and petitioner's participation in the offense charged, which evidence fully corroborated the victim's testimony as to petitioner's participation in the robbery and which was in no way challenged by petitioner's contrary evidence.

It is submitted that there is no reasonable doubt under the facts of this case that the verdict would have differed or a result more favorable to petitioner have

been reached if any alleged errors had not occurred. *Chapman* v. *California,* (1967) 386 U.S. 18, 22, 17 L.Ed.2d 705, 87 S.Ct. 824; *Fahy* v. *Connecticut* (1963) 375 U.S. 85, 11 L.Ed.2d 171, 84 S.Ct. 229.

CONCLUSION

Respondent respectfully submits that the judgment of the Court of Appeal of the State of California, Fifth Appellate District, should be affirmed.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 47

WALTER B. FOSTER,

Petitioner,

vs.

CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL
OF CALIFORNIA, FIFTH APPELLATE DISTRICT

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Foreword

Some preliminary comments on Respondent's Brief are indicated.

Throughout Brief for Respondent the expression, "totality of the circumstances" is referred to and emphasized as the controlling and significant statement in *Stovall* v. *Denno*, 388 U.S. 293, 18 L ed 2d 1149, 87 S.Ct. 1926 (1967)

(Br. 11, 13, 17, 24 & 25). The Court said at pages 301 to 302:

> "We turn now to the question whether petitioner, although not entitled to the application of *Wade* and *Gilbert* to his case, is entitled to relief on his claim that in any event the confrontation conducted in this case was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law. This is a recognized ground of attack upon a conviction independent of any right to counsel claim. *Palmer* v. *Peyton*, 359 F.2d 199 (C.A. 4th Cir. 1966). The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned. However, a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it, * * *"

It is clear the language used made reference solely to the events surrounding the confrontation between the witness and the suspect. In *Stovall*, the physical condition of the witness made necessary an immediate hospital confrontation. Also in *Simmons* v. *United States*, 390 U.S. 377, 19 L ed 2d 1247, 88 S.Ct. 967 (1968) similar imperative circumstances existed. The Court considered the circumstances surrounding the confrontation as counterbalancing and justifying identification procedures which may not have been in accord with complete fairness to the defendant.

Respondent would have the Court enlarge the meaning of the language in *Stovall* to consider evidence that petitioner had previously participated in a robbery of a West-

ern Union Office some years past, and, that federal law requires no corroboration of an alleged accomplice's testimony, and, that the Court did not give retroactive effect to the decisions in *Wade* and *Gilbert*, and, the nature of certain discovery rules in California, as factors in the "totality of the circumstances." This lends only confusion to the issues presented. The foregoing certainly have no bearing or relevance to the procedures followed by the police in their attempts to have the witness identify the petitioner as one of the men who robbed him and are totally unrelated to the confrontations.

What must be decided is whether the actions of the police and prosecution, *in the conduct of the lineups*, were so unnecessarily suggestive and conducive to irreparable mistaken identification. This is the issue. To decide the issue the factual background, reasons and basis of the lineup are explored and reviewed by the Court. Here there was no imperative or pressing need for the police and prosecution to deviate from fairly established and just lineup procedures in the confrontations with petitioner. A review of the events surrounding the confrontations in question develops no justification for the actions of the police and but one conclusion can be reached; that is, there was a violation of due process of law and petitioner is entitled to a reversal.

It is clear the fact no objection was raised at the time of trial, as to the lineup procedures would not constitute a waiver. *People* v. *Hillery*, 62 Cal.2d 692, 401 P.2d 382 (1965). The *Stovall* case had not been decided and California law at the time was embodied in *People* v. *Parham*, 60 Cal.2d 378, 384 P.2d 1001 (1963), which held the fact and circumstances of the lineup merely went to the weight

of the witness' testimony rather than the admissibility of same. After the *Stovall* case, the California Supreme Court, in *People* v. *Caruso,* 68 A.C. 181 (1968) followed the dictates of the United States Supreme Court and overruled *Parham* to the extent necessary to bring California decision in line with the decisions in *United States* v. *Wade, Gilbert* v. *California,* 388 U.S. 263, 18 L ed 2d 1178, 87 S.Ct. 1951 (1967), and *Stovall* v. *Denno. People* v. *Caruso,* 68 A.C. 181 at page 188 (footnote 3) (1968).

Also, citation of Public Law 90-351 as a mandate to the Supreme Court is hardly applicable. The legislation controls, if at all, federal cases. Further, the enacted legislation appears to be squarely in conflict with the decisions in *Wade, Gilbert* and *Stovall.* All safeguards for a defendant in lineup situations would be dispensed with by the legislation and a blanket provision would allow so-called eye-witness testimony into evidence despite any prejudice or unfairness in the confrontations. To follow the dictates of said legislation would violate petitioner's constitutional rights as set forth in the cited decisions.

ARGUMENT

I.

The Harmless Error Rule of Chapman v. California, 386 U.S. 18, 17 L ed 2d 705, 87 S.Ct. 824 (1967) Is Not Applicable to the Facts of This Case.

Respondent contends that despite any finding of violation of petitioner's rights under the Fourteenth Amendment the Court can consider such violation of rights as harmless error. Such contention on its face appears illogical and unreasonable. Petitioner contends that upon a finding of violation of due process that said finding would mandatorily require a finding of prejudice to the defendant and would call for an automatic reversal of the conviction.

Gilbert v. *California,* 388 U.S. 263, 18 L ed 1178, 87 S.Ct. 1951 (1967) and again, the expression "totality of the circumstances" from *Stovall* v. *Denno,* 388 U.S. 293, 18 L ed 2d 1199, 87 S.Ct. 1967 (1967) are cited to substantiate the claim that the Court can look to the harmless error rule in lineup situations.

First, there is a vast difference between the situations presented in the two cases. In *Gilbert,* the lineup was illegal by reason of the absence of counsel for the accused. It is obvious the procedures followed by the police may very well have been fair and just despite the absence of counsel and the reason for a hearing was to determine that the in court identifications had an independent source, or that their introduction and evidence was harmless error. However, a finding of violation of due process because lineup procedures were so unnecessarily suggestive and conducive

to irreparable mistaken identification is a far cry from the situation in *Gilbert* and by the very nature of the finding it is contended by petitioner that he would be prejudiced.

Second, respondent confuses the harmless error rule by attempting to tie said rule to the Court's fact finding process required in determining if a violation of due process was present (R. B. 25). These are separate issues and the issue of harmless error rule would not arise until such time as the Court made a finding in regard to petitioner's rights under the Fourteenth Amendment.

Chapman v. *California,* 386 U.S. 18, 17 L ed 2d 705, 87 S.Ct. 824 (1967) set forth at page 24 that " • • • before a federal constitutional error can be held harmless, the Court must be able to declare a belief that it was harmless beyond a reasonable doubt." Said case utilized the approach of the Court in *Fahy* v. *California,* 375 U.S. 85, 11 L ed 2d 171, 84 S.Ct. 229 (1963), that if there is a reasonable possibility that the evidence complained of might have contributed to the conviction, then harmless error is not applicable. The Court also acknowledged that some constitutional rights are so basic to a fair trial that their infraction can never be treated as harmless error. *Chapman* v. *California,* at page 23. A violation of due process in the conduct of a lineup should be added to the list of such basic constitutional rights.

If the Court does not accept the premise a violation of due process creates a mandatory reversal situation then to apply the standards of *Chapman* the entire facts of the case must be reviewed to determine if the evidence presented by Joseph David contributed to the conviction of petitioner. Most significant is the fact that Mr. David was

the principal witness against petitioner. other than the alleged accomplice, James B. Clay. Under California law, Penal Code Section 1111, the testimony of James B. Clay would not have been admissible without the corroboration of Mr. David. It follows that the entire case of the prosecution rested on the identification and testimony of said witness.

The contribution of the testimony of Mr. David, wherein he made his identifications, to the conviction of the petitioner can be ascertained, in part, by reference to the outcome of the prosecution case against co-defendant, John Henry Grice. The alleged accomplice, James B. Clay, fully implicated John Henry Grice in said robbery (A. 45 to 53), however, because Grice allegedly remained in the automobile outside the Western Union Office at the time of the robbery Mr. David made no identification of him (A. 43). The jury found John Henry Grice not guilty (A. 11).

A finding by the Court that the lineup procedures and the confrontation by the petitioner and the principal witness in this case were so unnecessarily suggestive and conducive to irreparable mistaken identification requires a further finding that said procedures and conduct of the police were harmful beyond cure and could not, under any circumstances, be treated as harmless error. Should the Court not agree with this position, it is clear that upon a review of the facts and circumstances of this case the testimony of Joseph E. David, which was tainted by the pretrial identifications, contributed to the conviction of petitioner, Walter E. Foster, and cannot be considered harmless error.

Conclusion

For the reasons appearing in petitioner's Opening Brief and here supplemented, it is again respectfully submitted that the judgment of conviction of petitioner, Walter Foster, in the District Court of Appeal, Fifth Appellate District, California, should be reversed.

Dated at Fresno, California.

Respectfully submitted,

KENNETH L. MADDY
Attorney for Petitioner,
Walter Foster

Proof of Service by Mail

STATE OF CALIFORNIA,
COUNTY OF FRESNO, *ss.*:

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is: 616 First Western Bank Building, 1221 Van Ness Avenue, Fresno, California 93721. On November 8, 1968, I served the within REPLY BRIEF OF PETITIONER on the party in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon prepaid, in the United States mail at Fresno, California, addressed as follows:

OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF JUSTICE
ROOM 500
WELLS FARGO BANK BUILDING
FIFTH STREET & CAPITOL MALL
SACRAMENTO, CALIFORNIA 95814

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on November 8, 1968, at Fresno, California.

ANNA M. CAMORODA

SUPREME COURT OF THE UNITED STATES

No. 47.—October Term, 1968.

Walter B. Foster, Petitioner, v. State of California.	On Writ of Certiorari to the Court of Appeal of California, Fifth Appellate District.

[April 1, 1969.]

Mr. Justice Fortas delivered the opinion of the Court.

Petitioner was charged by information with the armed robbery of a Western Union office in violation of California Penal Code § 211a. The day after the robbery one of the robbers, Clay, surrendered to the police and implicated Foster and Grice. Allegedly, Foster and Clay had entered the office while Grice waited in the car. Foster and Grice were tried together. Grice was acquitted. Foster was convicted. The California District Court of Appeal affirmed the conviction; the State Supreme Court denied review. We granted certiorari, limited to the question whether the conduct of the police lineup resulted in a violation of petitioner's constitutional rights. 392 U. S. 994 (1968).

Except for the robbers themselves, the only witness to the crime was Joseph David, the late night manager of the Western Union office. After Foster had been arrested, David was called to the police station to view a lineup. There were three men in the lineup. One was petitioner. He is a tall man; close to six feet in height. The other two men were short—five feet, five or six inches. Petitioner wore a leather jacket which David said was similar to the one he had seen underneath the coveralls worn by the robber. After seeing this lineup, David could not positively identify petitioner as the robber. He "thought" he was the man, but he

was not sure. David then asked to speak to petitioner, and petitioner was brought into an office and sat across from David at a table. Except for prosecuting officials there was no one else in the room. Even after this one-to-one confrontation David still was uncertain whether petitioner was one of the robbers: "truthfully—I was not sure," he testified at trial. A week or 10 days later, the police arranged for David to view a second lineup. There were five men in that lineup. Petitioner was the only person in the second lineup who had appeared in the first lineup. This time David was "convinced" petitioner was the man.

At trial, David testified to his identification of petitioner in the lineups, as summarized above. He also repeated his identification of petitioner in the courtroom. The only other evidence against petitioner which concerned the particular robbery with which he was charged was the testimony of the alleged accomplice Clay.[1]

In *United States* v. *Wade*, 388 U. S. 218 (1967), and *Gilbert* v. *California*, 388 U. S. 263 (1967), this Court held that because of the possibility of unfairness to the accused in the way a lineup is conducted, a lineup is a "critical stage" in the prosecution, at which the accused must be given the opportunity to be represented by counsel. That holding does not, however, apply to petitioner's case, for the lineups in which he appeared occurred before June 12, 1967. *Stovall* v. *Denno*, 388 U. S. 293 (1968). But in declaring the rule of *Wade* and *Gilbert* to be applicable only to lineups conducted after those cases were decided, we recognized that, judged by the "totality of the circumstances," the conduct of

[1] California law requires that an accomplice's testimony be corroborated. California Penal Code § 1111. There was also evidence that Foster had been convicted for a similar robbery committed six years before.

identification procedures may be "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to be a denial of due process of law. 388 U. S., at 302. See *Simmons* v. *United States*, 390 U. S. 377, 383 (1968); cf. P. Wall, Eye Witness Identification in Criminal Cases; J. Frank & B. Frank, Not Guilty; 3 J. Wigmore, Evidence § 786a; 4, *id.*, § 1130 (3d ed. 1940).

Judged by that standard, this case presents a compelling example of unfair lineup procedures.[2] In the first lineup arranged by the police, petitioner stood out from the other two men by the contrast of his height and by the fact that he was wearing a leather jacket similar to that worn by the robber. See *United States* v. *Wade*, *supra*, at 233. When this did not lead to positive identification, the police permitted a one-to-one confrontation between petitioner and the witness. This Court pointed out in *Stovall* that "the practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned." 388 U. S., at 302. Even after this the witness' identification of petitioner was tentative. So some days later another lineup was arranged. Petitioner was the only person in this lineup who had also participated in the first lineup. See Wall, *supra*, at 64. This finally produced a definite identification.

The suggestive elements in this identification procedure made it all but inevitable that David would identify petitioner whether or not he was in fact "the man." In effect, the police repeatedly said to the witness, "*This* is the man." See *Biggers* v. *Tennessee*, 390 U. S. 404,

[2] The reliability of properly admitted eyewitness identification, like the credibility of the other parts of the prosecution's case is a matter for the jury. But it is the teaching of *Wade*, *Gilbert*, and *Stovall*, *supra*, that in some cases the procedures leading to an eyewitness identification may be so defective as to make the identification constitutionally inadmissible as a matter of law.

407 (dissenting opinion). This procedure so undermined the reliability of the eyewitness identification as to violate due process.

In a decision handed down since the Supreme Court of California declined to consider petitioner's case, it reversed a conviction because of the unfair makeup of a lineup. In that case, the California court said "[W]e do no more than recognize . . . that unfairly constituted lineups have in the past too often brought about the conviction of the innocent." *People* v. *Caruso*, — Cal. —, —, 436 P. 2d 336, 340 (1968). In the present case the pretrial confrontations clearly were so arranged as to make the resulting identifications virtually inevitable.

The respondent invites us to hold that any error was harmless under *Chapman* v. *California*, 386 U. S. 18 (1967). We decline to rule upon this question in the first instance. Accordingly, the judgment is reversed and the case remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE WHITE, with whom MR. JUSTICE HARLAN and MR. JUSTICE STEWART concur, being unwilling in this case to disagree with the jury on the weight of the evidence, would affirm the judgment.

SUPREME COURT OF THE UNITED STATES

No. 47.—October Term, 1968.

Walter B. Foster, Petitioner, v. State of California. | On Writ of Certiorari to the Court of Appeal of California, Fifth Appellate District.

[April 1, 1969.]

Mr. Justice Black, dissenting.

The Court here directs California to set aside petitioner Foster's conviction for armed robbery of the Western Union Telegraph Company at Fresno, California. The night manager of the telegraph company testified before the court and jury that two men came into the office just after midnight, February 25, 1966, wrote a note telling him it was a holdup, put it under his face, and demanded money, flashed guns, took $531 and fled. The night manager identified Foster in the courtroom as one of the men, and he also related his identification of Foster in a lineup a week or so after the crime. The manager's evidence, which no witness disputed, was corroborated by the testimony of a man named Clay, who was Foster's accomplice in the robbery and who testified for the State. The testimony of these two eyewitnesses was also corroborated by proof that Foster and another person had committed a prior armed robbery of a Western Union office in another city six years before, when they appeared at the company's office, presented a note to an employee announcing their holdup, flashed a gun, and fled with company money. In this case Foster's attorney admitted conviction for the prior Western Union armed robbery.[1]

[1] Counsel also admitted a prior felony conviction of assault with intent to commit rape, a circumstance relevant in California in connection with punishment.

The circumstances of the two robberies appear to have been practically indistinguishable. Such evidence that a particular person committed a prior crime has been almost universally accepted as relevant and admissible to prove that the same person was responsible for a later crime of the same nature.[2] A narration of these facts, falling from the lips of eyewitnesses, and not denied by other eyewitnesses, would be enough, I am convinced, to persuade nearly all lawyers and judges, unhesitatingly to say, "There was clearly enough evidence of guilt here for a jury to convict the defendant since, according to practice, and indeed constitutional command, the weight of evidence is for a jury, and not for judges." Nevertheless the Court in this case looks behind the evidence given by witnesses on the stand, and decides that because of the circumstances under which one witness first identified the defendant as the criminal, the United States Constitution requires that the conviction be reversed. The Court, however, fails to spell out exactly what should happen to this defendant if there must be a retrial, and thus avoids the apparently distasteful task of specifying whether (1) at the new trial the jury would again be permitted to hear the eyewitness' testimony and the in-court identification, so long as he does not refer to the previous lineups, or (2) the eyewitness' "tainted" identification testimony must be entirely excluded, thus compelling Foster's acquittal. Objection to this ambiguity is the first of my reasons for dissent.

I.

The Court declares the judgment of conviction is reversed and the case remanded for further proceedings

[2] See *Spencer* v. *Texas*, 385 U. S. 554, 560–561 and n. 7 (1967); *State* v. *Chance*, 92 Ariz. 351, 377 P. 2d 197 (1962); *Nester* v. *State*, 75 Nev. 41, 334 P. 2d 524 (1959); *Mosley* v. *State*, 211 Ga. 611, 87 S. E. 2d 314 (1955); Wigmore, Evidence § 416 (3d ed. 1940 and 1964 Supp.).

not inconsistent with this opinion. I am compelled to say that if I were the trial judge in this case I would not know how to proceed or how to decide whether the "error" in this case was harmless. Of course, when a confession is held to have been compelled, that confession must not be admitted to convict the defendant at all. But the situation in this case is not that simple. For the Court has in effect decided here that the officers of the law have so "arranged" lineups that the eyewitness to the robbery has been led to make an "irreparable mistaken identification." In other words, no one now or hereafter can believe his identification of Foster as the robber. Since he and the accomplice are the only eyewitnesses, and since, in order to convict California law requires evidence of an accomplice to be corroborated, the Court's direction means, I suppose, that the trial judge here should dismiss the case.[3] The Court's dilemma, which leads to its ambiguous judgment as to the further disposition of this case, points, I think, to the irreparable harm done to the cause of justice by the Court's holding in this case.

II.

Far more fundamental, however, is my objection to the Court's basic holding that evidence can be ruled constitutionally inadmissible whenever it results from identification procedures that the Court considers to be "unnecessarily suggestive and conducive to irreparable mistaken identification."[4] One of the proudest achievements of

[3] The Court apparently means that the only other evidence against Foster in this case—his prior conviction for involvement in a crime of a similar type—is constitutionally admissible. See *Spencer* v. *Texas*, *supra*. But it may be doubtful whether this past conviction, although highly relevant to the question of guilt, could constitute corroboration of the accomplice's testimony, within the meaning of the California requirement.

[4] *Ante*, p. 2, quoting from *Stovall* v. *Denno*, 388 U. S. 293, 302 (1967).

this country's Founders was that they had eternally guaranteed a trial by jury in criminal cases, at least until the Constitution they wrote had been amended in the manner they prescribed. Only last year in *Duncan* v. *Louisiana*, 391 U. S. 148 (1968), this Court emphatically decided, over strong dissents, that this constitutional right to trial by jury in criminal cases is applicable to the States. Of course it is an incontestable fact in our judicial history that the jury is the sole tribunal to weigh and determine fates. That means that the jury must, if we keep faith with the Constitution, be allowed to hear eyewitnesses and decide for themselves whether they can tell the truth and whether they are telling the truth. It means that the jury must be allowed to decide for themselves whether the darkness of the night, the weakness of a witness' eyesight, or any other factor impaired the witness' ability to make an accurate identification. To take that power away from the jury is to rob them of the responsibility to perform the precise functions the Founders most wanted them to perform. And certainly a Constitution written to preserve this indispensable, unerodible core of our system for trying criminal cases would not have included, hidden among its provisions, a slumbering sleeper granting the judges license to destroy trial by jury in whole or in part.

This brings me to the constitutional theory relied upon by the Court to justify its invading the constitutional right of jury trial. The Court here holds that:

> ". . . judged by the 'totality of the circumstances,' the conduct of identification procedures may be 'so unnecessarily suggestive and conducive to irreparable mistaken identification' as to be a denial of due process of law . . . .
>
> "Judged by that standard, this case presents a compelling example of unfair lineup procedures." *Ante*, at 2–3.

I do not deny that the "totality of circumstances" can be considered to determine whether some specific constitutional prohibitions have been violated, such, for example, as the Fifth Amendment's command against compelling a witness to incriminate himself. Whether evidence has been compelled is, of course, a triable issue of fact. And the constitutional command not to compel a person to be a witness against himself, like other issues of fact, must be determined by a resolution of all facts and the "totality" of them offered in evidence. Consequently were the Court's legal formula posed for application in a coerced testimony case, I could agree to it. But it is not. Instead the Court looks to the "totality of circumstances" to show "unfair lineup procedures." This means "unfair" according to the Court's view of what is unfair. The Constitution, however, does not generally prohibit conduct deemed unfair by the courts. As we recently said in *United States* v. *Augenblick*, — U. S. —, — (1969): "Rules of evidence are designed in the interests of fair trials. But unfairness in result is no sure measure of unconstitutionality."

The Constitution sets up its own standards of unfairness in criminal trials in the Fourth, Fifth, and Sixth Amendments among other provisions of the Constitution. Many of these provisions relate to evidence and its use in criminal cases. The Constitution provides that the accused shall have the right to compulsory process for obtaining witnesses in his favor. It ordains that evidence shall not be obtained by compulsion of the accused. It ordains that the accused shall have the right to confront the witnesses against him. In these ways the Constitution itself dictates what evidence is to be excluded because it was improperly obtained or because

it is not sufficiently reliable. But the Constitution does not give this Court any general authority to require exclusion of all evidence that this Court considers improperly obtained or that this Court considers insufficiently reliable. Hearsay evidence, for example, is in most instances rendered inadmissible by the Confrontation Clause, which reflects a judgment, made by the Framers of the Bill of Rights, that such evidence may be unreliable and cannot be put in proper perspective by cross-examination of the person repeating it in court. Nothing in this constitutional plan suggests that the Framers drew up the Bill of Rights merely in order to mention a few types of evidence "for illustration," while leaving this Court with full power to hold unconstitutional the use of any other evidence that the Justices of this Court might decide was not sufficiently reliable or was not sufficiently subject to exposure by cross-examination. On the contrary, as we have repeatedly held, the Constitution leaves to the States and to the people all these questions concerning the various advantages and disadvantages of admitting certain types of evidence. *Spencer* v. *Texas*, 385 U. S. 554 (1967); *Michelson* v. *United States*, 335 U. S. 469 (1948).

It has become fashionable to talk of the Court's power to hold governmental laws and practices unconstitutional whenever this Court believes them to be "unfair," contrary to basic standards of decency, implicit in ordered liberty, or offensive to "those canons of decency and fairness which express the notions of justice of English-speaking peoples . . . ."[5] All of these different general and indefinable words or phrases are the fruit of the same, what I consider to be poisonous, tree, namely, the doctrine that this Court has power to make its own

[5] *Malinski* v. *New York*, 324 U. S. 401, 416–417 (1945); see also *Rochin* v. *California*, 342 U. S. 165 (1952); *Irvine* v. *California*, 347 U. S. 128 (1954).

ideas of fairness, decency, and so forth, enforceable as though they were constitutional precepts. When I consider the incontrovertible fact that our Constitution was written to limit and define the powers of the Federal Government as distinguished from the powers of States, and to divide those powers granted the United States among the separate Executive, Legislative, and Judicial branches, I cannot accept the premise that our Constitution grants any powers except those specifically written into it, or absolutely necessary and proper to carry out the powers expressly granted.

I realize that some argue that there is little difference between the two constitutional views expressed below:

> "One. No law should be held unconstitutional unless its invalidation can be firmly planted on a specific constitutional provision plus the necessary and proper clause.
>
> "Two. All laws are unconstitutional that are unfair, shock the conscience of the Court, offend its sense of decency, or violate concepts implicit in ordered liberty."

The first of these two constitutional standards plainly tells judges they have no power to hold laws unconstitutional unless such laws are believed to violate the written Constitution. The second constitutional standard, based on the words "due process," not only does not require judges to follow the Constitution as written, but encourages judges to hold laws unconstitutional on the basis of their own conceptions of fairness and justice. This formula imposes no "restraint" on judges beyond requiring them to follow their own best judgment as to what is wise, just, and best under the circumstances of a particular case. This case well illustrates the extremes to which the formula can take men who are both wise and good. Although due process requires that courts summon witnesses so that juries can determine the guilt or

innocence of defendants, the Court, because of its sense of fairness, decides that due process deprives juries of a chance to hear witnesses whom the Court holds could not or would not tell the truth.

I began my opposition to this fallacious concept of "due process" even before I became a member of this Court[6] and expressed it formally soon after my service on the Court began.[7] And it was not long before I emphasized that quite a different belief about the meaning of the phrase "due process" had long existed in our judicial history in opposition to the "decency and fairness" doctrine. See *Chambers* v. *Florida*, 309 U. S. 227, 235–236, n. 8 (1940).

My experience on the Court has confirmed my early belief that the "decency and fairness" due process test cannot stand consistently with our written Constitution.

III.

I agree with the Court that we should not undertake to pass on the question of harmless error for the first time in this Court. Under the Court's holding, the case should be remanded to the state courts for decision of this question.

In recent years this Court has, in a series of cases, held that most of the Bill of Rights are now applicable against the States as well as against the Federal Government. This has brought about a tremendous increase in the number of state criminal cases involving federal questions, some of which depend on the particular facts and circumstances of the case. In Fifth Amendment confession cases, for example, courts must under prevailing practice hear evidence to determine whether confessions were compelled. This Court has power in cases of

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[6] See, *e. g.*, 81 Cong. Rec., App. pt. 9, pp. 638–639; *id.*, at 307.

[7] See, *e. g.*, *McCart* v. *Indianapolis Water Co.*, 302 U. S. 419, 423 (1938) (dissenting opinion).

that kind to review evidence before the trial courts. No one can now predict with accuracy how great a number of such cases are destined to come before us, but all know it will be many. Should we not make it an almost invariable practice to accept lower court findings of fact on such issues, our Supreme Court is likely to find itself preoccupied with the business of a state court of criminal appeals, a condition not devoutly to be wished in the Court's interest or in the interest of the administration of justice in general. This problem is magnified many times over when account is taken of the harmless error rules that many States have now adopted, since these rules also raise factual issues involving a federal question whenever the error itself is federal. See *Chapman v. California*, 386 U. S. 18 (1967). If trial errors are found some courts along the line must determine whether the error was harmless. That question has, because of this Court's judgment, now arisen in this case. I agree with the Court that we should not decide this question here. In the present posture of criminal law, there are simply too many federal questions in the state cases before us to defend a practice of our deciding in the first instance that there was no harmless error. There are many reasons for this other than the necessity of saving our time for the vastly more important issues we must decide. To say the least, the question whether an error in a particular case is harmless is an issue peculiarly for lower not for the highest appellate courts. Then, too, this issue can usually be tried more efficiently, and just as fairly, by the local court that tried the case or by the local appellate court that heard the first appeal. This Court was not established to try such minor issues of fact for the first time. Of course, I do not mean to suggest that there should be an ironclad rule always barring the Court from deciding an issue in cases if it plainly and manifestly appears that it would be egregiously unjust and

undoubtedly wrong to leave an issue undecided. But I do not think this even distantly approaches being such a case. Even though I steadfastly believe the Court's basic holding is error, I do agree that we should not establish a precedent of passing on harmless error for the first time in this Court before the courts below have had an opportunity to consider the question.

For the above reasons I dissent from the reversal and remand of this case.